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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~294~~ 571

JAMES KELLY, PLAINTIFF IN ERROR,

vs.

THE CITY OF PITTSBURGH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED OCTOBER 18, 1878.

SUPREME COURT OF THE UNITED STATES.

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1 In the supreme court of Pennsylvania, western district. No. 172 of October and November T., 1876.

JAMES KELLY, PL'T'FF IN ERROR & BELOW,
vs.
THE CITY OF PITTSBURGH.

Certiorari to common pleas No. one, of Allegheny County, at No. 941, September term, 1874.

July 3rd, 1876.—Præcipe, affidavit, and recognizance filed, and writ issued. Rule, &c.

September 22d, 1876.—Record returned and errors assigned.

October 31st, 1876.—Argued.

January 2d, 1877.—This case ordered to be reargued before a full bench. Per curiam.

October 4th, 1877.—Reargued.

January 7th, 1878.—Decree affirmed; opinion by Gordon, J.; Sterrett, J., dissents; Agnew, C. J., dissents, and files dissenting opinion.

January 12th, 1878.—Appeal to the Supreme Court of the United States.

February 7th, 1878.—Petition for writ of error and citation to the Supreme Court of the United States, endorsed, "Allowed. W. Strong, J.;" bond approved by W. Strong, J.; writ of error to the Supreme Court of the United States, and citation, with service thereof by defendant's attorney accepted, filed.

From the record. Attest.

[SEAL.] J. B. SWEITZER,
Prothonatory.

I, J. B. Sweitzer, pro. S. C., W. D., do hereby certify that the *the* foregoing is a true copy of the docket entries of all proceedings in said court in said cause No. 172 of Oct. & Nov'r t., 1876; and that hereto attached is a full and true copy of the record in said cause at the same remains on file in my office.

Witness my hand and the seal of said court at Pittsb'g this 17 day of Oct., 1878.

J. B. SWEITZER,
Pro. S. C., W. D.

2 In the court of common pleas No. one, of Allegheny County, Penna. In equity. No. 941, September term, 1874.

JAMES KELLY
vs.
THE CITY OF PITTSBURGH.

August 15th, 1874.—Bill in equity filed.

August 17th, 1874.—Served James Blackmore, mayor, and Robert M. Snodgrass, controller, of the city of Pittsburgh.

October 17th, 1874.—Motion for preliminary injunction came on to be heard, and, after due consideration, motion for preliminary injunction refused. By the court.

October 17th, 1874.—Rule on defendants to plead, answer, or demur on thirty days' notice. Service of rule accepted by defendant's attorney.

October 25th, 1874.—Leave granted to amend the bill of plaintiff by

having the printed bill authenticated by the oath of complainant and *natural* seal and signature, in like manner as the original bill was when sent to the printer. By the court.

November 25th, 1874.—Answer filed.

November 28th, 1874.—Replication filed.

November 30th, 1874.—On motion of complainant by his solicitor, Thomas MacConnell, esq., appointed examiner and master to take testimony, in conformity with the rules of court in such case made and provided. By the court.

June 4th, 1875.—Powers of master and examiner enlarged, as per order of court filed.

September 4th, 1875.—Report of master and complainant's exceptions to master's report filed. Memorandum of meetings and affidavit for a rehearing filed same day testimony filed.

And now, June 10th, 1876, this cause came on to be heard on master's report and exceptions thereto, and, upon consideration thereof, the exceptions to the report are dismissed, and it is ordered, adjudged and decreed that the bill be hence dismissed with costs. Per curiam.

July 3d, '76.—Certiorari filed eo die acceptance of service filed.

Appeal, affidavit, and recognizance filed July 26th, 1876.

From the record. Attest.

B. F. KENNEDY,
Prothonatory.

3 *Bill of complainant.*

In the court of common pleas of Allegheny County, Pa., sitting in equity.

BETWEEN JAMES KELLY, PLAINTIFF,
and
THE CITY OF PITTSBURGH, DEFENDANT.

To the honorable the judges of said court:

First. Your orator, James Kelly, complains and says that he is the owner of a farm of eighty (80) acres of land, in the twenty-first (21st) ward of the city of Pittsburgh, Collins Township, Allegheny County, bounded on the north by the lands of —— Spencer and Dr. Wilson, on the west by the lands of the McCombs heirs, on the south by the lands of the heirs of William Elliott, now owned in part by Thomas Millon, and on the east by line of Wilkins Township and other lands of your orator, and within the consolidated limits of the city of Pittsburgh, and mentioned in printed form for an application to committee on appeals of the board of revision upon assessed valuation for 21st ward, a copy of which is hereto atached, marked Exhibit A.

Second. That defendant city, with the single purpose and intention of increasing her revenues without regard to the property rights or wishes of your orator, and without any pretext of extending any municipal benefits of any kind to him, and against his will, through the aid of a portion of the citizens living in the new districts, was instrumental in procuring an act of the legislature extending the territorial limits of the city of Pittsburgh over and beyond his farm, with full knowledge that it was an improved farm, occupied by the owner as fields, pasture and woodlands, situated and adapted to farming
4 or agricultural purposes only, and had always heretofore and since been used as such. That the said lands had never been nor have

they as yet been laid off in lots or streets or avenues or city improvements of any kind made thereon; nor used or needed in any way for city purposes. That the city defendant has not filled up her original limits, but that large quantities of vacant lands lay between your orator's said lands and the inhabited portions of said city defendant, accommodated with city protection, control, and care, improvements and conveniences furnished by defendant city, in consideration whereof she may levy taxes; consequently the natural growth and developments in extension of defendant city has not, and your orator believes will not for a generation to come, need or require any portion of your orator's said lands for city purposes to accommodate her increasing population. That not one single city improvement, convenience, protection, regulation, care, water facility, road or street convenience, protection from fire, drainage, light, schools, benefit, care, or attention has been bestowed on said land.

Third. That your orator's farm, improved and now occupied as aforesaid, has received no benefits from defendant city whatever, and can derive none. That defendant city has never expended a dollar for the use and benefit or in any manner designed to enhance the value of your orator's farm, nor does he require or expect anything from the defendant city, for as his farm is not needed for city purposes it is his
5 wish and desire to continue to use and occupy it, as he has been doing, for farm or agricultural purposes.

Fourth. Your orator further shows unto your honorable court that he has not himself appropriated his said lands to town or city purposes; he has not laid it off into parcels or lots; he has not opened streets thereon, nor invited or held out inducements to any one to come, purchase, or settle on the same, for he does not wish so to do, or to sell, but to retain the same for his own use, and not divert it to any other purpose than as a farm; and until the natural growth and multiplication of numbers and extension and reasonable business of defendant (city) shall require the use of his said farm for city purposes, he denies the right of defendant (city) to invade or interfere with his said premises, or require him to abandon the rural use thereof; and he calls upon this honorable court to shield and protect him in his legal rights and occupancy of his said lands against the aggressive, oppressive, and supposed illegal course pursued towards him in the premises by defendant (city of Pittsburgh), that claims to have the right, and is attempting to enforce it, of collecting municipal taxes where she does not pretend, nor is she making any effort, to extend municipal benefits.

Fifth. That the limits territorial of defendant (city) were so extended by the act known as the act of consolidation as to embrace your orator's said farm and a vast amount of additional territory, so that your orator admits that his farm is within the territorial limits of said
6 defendant (city), and that this was done without his approbation, and against his will; that he never has condoned the act aforesaid, and when required to submit to the consequent exactions and wrongs perpetrated by defendant (city) against him, he has done it under protest, not in a single instance waiving his rights.

Sixth. It is competent for the legislature, with or without the consent of the citizens, to enlarge the limits of any town or city, and it is competent for the defendant (city), when the requirements of population, commercial and mechanical interests, sanitary or protective municipal purposes, require it, to apply to city uses the full extent of her territorial limits; but your orator expressly denies that such necessity or even propriety exists; on the contrary, large amounts of city territory

on either side and in front of your orator's farm are unoccupied, held, and owned, without prospect of demand for city purposes for many years to come. Your orator insists that by extension of territorial limits the character, situation, and use of his said lands were not changed, but remain an improved and occupied farm as before, and agricultural lands only, having received no benefits whatever in the way of municipal improvements, aid, protection, convenience, or care, and that therefore they are not in any sense liable to municipal or city taxation for any purpose whatever, for no single benefit has been received, and that increased revenue is all defendant (city) seeks or cares for.

Seventh. Your orator denies that in virtue of mere territorial boundaries jurisdiction was conferred upon defendant to impose upon your orator's aforesaid farm of 80 acres of land, always heretofore and
7 now used and occupied for farm purposes, municipal taxes; they are not, and never have been, used or appropriated to municipal, town, or city purposes; not one single street has ever been opened, not one building on or near them erected for town or city purposes, not one single improvement projected or contemplated by defendant (city), not one benefit conferred, not one foot of his 80 acre farm as aforesaid required or needed by the city (defendant), but revenue only, and no useful appropriation is intended by said defendant for the good of the city, so far as your orator is concerned.

Eighth. Your orator further shows your honorable court that he has paid always heretofore all county and State taxes due on his said farm; that he has paid the county taxes thereon for the year 1874, and he utterly denies the right of the defendant (city of Pittsburgh) to impose any tax upon his farm for municipal or city objects, for it is requiring his money for purposes in which he has no interest, and for the use and benefit of others; that his farm has received no benefits, and he submits that he should not be required to make recompense. He was brought into the city limits without his consent; his said lands were farm lands before, and they are farm lands still, injured and not benefited by the conjunction, and should not pay for it.

Ninth. That notwithstanding all these facts, your orator alleges and charges that the defendant (city), by her assessor and agent, has caused your orator's farm of 80 acres as aforesaid to be assessed at three thousand dolls. per acre, and, including a few necessary farm improvements, has returned it at an assessed value of two hundred and forty-
8 four thousand dolls., and has levied taxes thereon accordingly, amounting to twenty-six hundred and seventy-two $\frac{45}{100}$ dolls. as city taxes thereon for the year A. D. 1874, as more fully appears by the notice served on your orator by C. L. Magee, city treasurer, a copy whereof is hereunto attached, and to be taken and considered as a portion of this bill, marked Exhibit B; that on June 30th, A. D. 1874, he (your orator) paid the county taxes on his said farm, amounting to four hundred and twenty-eight & $\frac{47}{100}$ dolls., in the aggregate three thousand one hundred & $\frac{95}{100}$ dolls., taxes on his said farm for the present year, 1874. He attaches to this bill a copy of the receipt of the county treasurer, Fleming, Exhibit C.

Tenth. That the greatest productive income or value from said farm, well managed and rented for as much as any farm of like character and situation in the county of Allegheny, has been ten dolls. per acre, or eight hundred dollars per year, and this, your orator charges, is as much as any tenant can pay and support himself; that $428.47 was applied to county taxes, the balance, $371.53, mainly required for necessary repairs, leaving said city taxes unpaid by any income or productive value

of his said farm, and can only be paid by taking the farm or a portion thereof itself.

Eleventh. Your orator, further complaining, charges, by whatever name it may be called, or whatever manner or pretext is resorted to to accomplish it, if the said defendant (city) is permitted thus to confiscate or deprive him of his individual property, through pretended taxing power or otherwise, it is forcing your orator to surrender his property for the benefit of others, public or private. No compensation
9 has been given, none *none* promised, and none intended. That such exercise of power by any tribunal, State or municipal, passes the line which should be the boundary between taxation and confiscation, and is condemned and prohibited by article 5 of amendments to the Constitution of the United States, which says, "No private property shall be taken for public use without just compensation," and your orator especially invokes, at the hands of this honorable court, the benefit and protection of this constitutianal provision to restrain the despotism of defendant (city), and to prevent the sacrifice of his property.

Twelfth. Your orator submits that defendant's power of taxation is not unlimited or unrestricted, even within her territorial limits. That city or town limits, fixed by the supreme legislative power of the State, are intended for the future prospective growth and necessities of cities and towns, but does not confer power upon such cities or towns to tax the newly added territory until the same is appropriated to city uses, improved, and city or municipal protection, conveniences, aids, and facilities are extended to said newly acquired territory, for local special taxation and local benefits are correlative, inseperable, and dependant; and that the attempt of the defendant (city) to force city revenue for the purpose of making municipal improvements, not one of which has been extended or can be extended to your orator's farm, is directly in conflict with the rights of your orator, guarded and protected by article 1, section 10, of the Declaration of Rights of the State constitution of Pennsylvania, which provides that "no private property shall be taken or applied to public use without authority of law, and without just compensation being
10 first made or secured." Your orator invokes the protection of this constitutional provision and others, because the sum demanded by defendant is not increased burdens or assessments put upon his lands, but an actual consumption or taking of them contrary to all law; for, as hereinbefore stated, when viewed even as taxes, said defendant (city) had no right to impose them; and it is a taking within the proper construction of the Constitution, as above cited.

Thirteenth. That by article 9, section 7, constitution of Penna., it is provided "that the debt of no city or district shall exceed seven per cent. per annum upon the assessed value of the property therein;" and your orator shows that the defendant (city), on said farm, for the year A. D. 1874, has increased her assessment, consequently taxation, about seven hundred per cent. over that of 1873; that there exists no necessity for this increase that did not exist last year; and he avers the fact to be that the intent and purpose of this increase is to evade the constitutional provision last cited, and is legally fraudulent, and deserving of judicial censure.

Fourteenth. That when he was advised of this action taken by defendant (city), by her agents and servants, he made application to the board of revision for grievances and errors in assessments, and protested against this assumption of jurisdiction over his farm lands by defendant (city) for city purposes only, when he had paid all county and other taxes on his said lands; that he even asked for a reduction, denying, at

the same time, any right in defendant (city) to tax his said lands; his appeal was overruled and dismissed, and all redress was refused him.

Fifteenth. Your orator further represents that shortly after the
11 act of consolidation, extending the limits of the city of Pittsburgh, was passed, six or seven years since, said defendant (city) had some surveys made fixing her boundaries, and marking and designating where streets might at some future day be made; and in this way, he is informed and believes, defendant surveyed his lands, but with no present intention at the time of occupying the same for city purposes, or of making city improvements, for they are not required or needed for that purpose, and your orator believes will not be for fifty years to come;, and your orator submits that this nominal exercise of municipal jurisdiction, unconnected with any protection, aid, improvements, or city benefits, is not such an appropriation as justifies taxing for municipal benefits from year to year, when none of said improvements or benefits extend to or near your orator's land; and that said defendant (city) cannot justify her demand for enormous revenues by any such incipient and limited proceedings.

Sixteenth. That defendant is threatening to enforce the collection of the said pretended taxes, and, your orator is informed and believes, fully intends to do so, unless prevented by this honorable court. That your orator has no personal property on his said farm to be subjected to the payment of said taxes, and that if said defendant (city) is not restrained and prevented, the farm lands themselves will be taken, the tenant in possession interrupted and disseized, and your orator's title embarrassed, and wrong and injury done him, when, as he affirms, said defendant has no legal demand against him.

Seventeenth. That if defendant's right to tax your orator's farm was undisputed, the said assessment and consequent taxes are many
12 times more than the cash or commercial value thereof, for his said farm is not and cannot be classed as city property; the said assessment is unreasonable and oppressive, and that defendant's assessment is not in keeping with the current value of similar property in the immediate vicinity and adjoining your orator's farm. That said valuation is arbitrary, and an attempt at a gross legal fraud and wrong. But your orator expressly denies that defendant has any municipal jurisdiction over his said land or farm, or any right to impose taxes thereon for city or municipal purposes whatever.

Your orator, therefore, needs equitable relief to prevent the completion of incipient wrong and injury, and prays the court:

1. That, by preliminary special injunction issuing out of this court, defendant, City of Pittsburgh, be restrained and enjoined from enforcing the collection of the taxes levied upon his aforesaid farm, based upon the assessment hereinbefore mentioned, or taxes levied upon said land or farm of any description, by the municipal authorities of defendant, City of Pittsburgh, for municipal or city purposes.

2. That defendant (city) be enjoined from all interference, control, or attempted or assumed jurisdiction over the said lands or farm of your orator as city or municipal lands or property, as taxable for corporate municipal objects and purposes, and that she and all her subordinate functionaries or agents treat them as farm lands, and not as city property liable to her taxing power.

13 3. That the ordinance of equalization of the day of , year of , pretending to authorize the assessment and levying the said taxes mentioned in your orator's bill, and any and all other ordinances of the defendant (city) ordering or claiming said lands or farm

as city lands or property, subject to city taxes, be declared by the court as absolutely null and void.

4. Prays for process against said defendant (city) to be issued, returnable, &c., according to the rules in chancery in such case made and provided.

5. That, upon the hearing of the merits of your orator's case, an injunction perpetual be issued, restraining said defendant (city) from again assessing or taxing your orator's said lands or farm, or from exercising any municipal jurisdiction over the same for raising city revenue, as long as said lands or farm shall be, as they are in fact, farm or agricultural lands and appropriated to such purposes.

6. That this honorable court grant your orator such other relief as in equity and to the premises justly belong; and he will ever pray, &c., &c.

JAMES KELLY,
By his solicitor, W. H. SUTTON.

COMMONWEALTH OF PENN'A,
Allegheny County:

Personally appeared before me James Kelly, to me well known, who, being first sworn, says that the allegations contained in the foregoing bill of complaint are true, to the best of his knowledge and belief.

JAMES KELLY.

Sworn to and subscribed before me this 21st day of July, 1874.

R. A. BALPH,
Notary Public.

14 EXHIBIT A.

To the committee on appeals of the board of revision of the city of Pittsburgh:

GENTLEMEN: The undersigned respectfully represents that he is the owner of the following property, situate in the 21st ward of said city; that the board of revision have attached to it a valuation of $ as herein set forth, for taxation for city purposes; that verily believes that valuation to be excessive and beyond the actual value thereof; and that the actual value of said property is as herein set forth:

Description of property.	Assessed valuation.	Owner's valuation.
Eighty acres of land	$240,000 00	
Two story thirteen room house	2,800 00	
Frame barn	800 00	
Two story frame & log house	150 00	
Slab stable	50 00	
Shed	100 00	
Milk-house	50 00	
	$244,000 00	

And further, he therefore needs relief, and appeals from said assessment to your committee, and asks that the assessment be changed so as to conform to the valuation as above fixed by him upon said property, denying your right to tax at all.

JAMES KELLY.

Sworn & subscribed this day of , A. D. 1874.

the same time, any right in defendant (city) to tax his said lands; his appeal was overruled and dismissed, and all redress was refused him.

Fifteenth. Your orator further represents that shortly after the
11 act of consolidation, extending the limits of the city of Pittsburgh, was passed, six or seven years since, said defendant (city) had some surveys made fixing her boundaries, and marking and designating where streets might at some future day be made; and in this way, he is informed and believes, defendant surveyed his lands, but with no present intention at the time of occupying the same for city purposes, or of making city improvements, for they are not required or needed for that purpose, and your orator believes will not be for fifty years to come;, and your orator submits that this nominal exercise of municipal jurisdiction, unconnected with any protection, aid, improvements, or city benefits, is not such an appropriation as justifies taxing for municipal benefits from year to year, when none of said improvements or benefits extend to or near your orator's land; and that said defendant (city) cannot justify her demand for enormous revenues by any such incipient and limited proceedings.

Sixteenth. That defendant is threatening to enforce the collection of the said pretended taxes, and, your orator is informed and believes, fully intends to do so, unless prevented by this honorable court. That your orator has no personal property on his said farm to be subjected to the payment of said taxes, and that if said defendant (city) is not restrained and prevented, the farm lands themselves will be taken, the tenant in possession interrupted and disseized, and your orator's title embarrassed, and wrong and injury done him, when, as he affirms, said defendant has no legal demand against him.

Seventeenth. That if defendant's right to tax your orator's farm was undisputed, the said assessment and consequent taxes are many
12 times more than the cash or commercial value thereof, for his said farm is not and cannot be classed as city property; the said assessment is unreasonable and oppressive, and that defendant's assessment is not in keeping with the current value of similar property in the immediate vicinity and adjoining your orator's farm. That said valuation is arbitrary, and an attempt at a gross legal fraud and wrong. But your orator expressly denies that defendant has any municipal jurisdiction over his said land or farm, or any right to impose taxes thereon for city or municipal purposes whatever.

Your orator, therefore, needs equitable relief to prevent the completion of incipient wrong and injury, and prays the court:

1. That, by preliminary special injunction issuing out of this court, defendant, City of Pittsburgh, be restrained and enjoined from enforcing the collection of the taxes levied upon his aforesaid farm, based upon the assessment hereinbefore mentioned, or taxes levied upon said land or farm of any description, by the municipal authorities of defendant, City of Pittsburgh, for municipal or city purposes.

2. That defendant (city) be enjoined from all interference, control, or attempted or assumed jurisdiction over the said lands or farm of your orator as city or municipal lands or property, as taxable for corporate municipal objects and purposes, and that she and all her subordinate functionaries or agents treat them as farm lands, and not as city property liable to her taxing power.

13 3. That the ordinance of equalization of the day of , year of , pretending to authorize the assessment and levying the said taxes mentioned in your orator's bill, and any and all other ordinances of the defendant (city) ordering or claiming said lands or farm

as city lands or property, subject to city taxes, be declared by the court as absolutely null and void.

4. Prays for process against said defendant (city) to be issued, returnable, &c., according to the rules in chancery in such case made and provided.

5. That, upon the hearing of the merits of your orator's case, an injunction perpetual be issued, restraining said defendant (city) from again assessing or taxing your orator's said lands or farm, or from exercising any municipal jurisdiction over the same for raising city revenue, as long as said lands or farm shall be, as they are in fact, farm or agricultural lands and appropriated to such purposes.

6. That this honorable court grant your orator such other relief as in equity and to the premises justly belong; and he will ever pray, &c., &c.

JAMES KELLY,
By his solicitor, W. H. SUTTON.

COMMONWEALTH OF PENN'A,
Allegheny County:

Personally appeared before me James Kelly, to me well known, who, being first sworn, says that the allegations contained in the foregoing bill of complaint are true, to the best of his knowledge and belief.

JAMES KELLY.

Sworn to and subscribed before me this 21st day of July, 1874.

R. A. BALPH,
Notary Public.

14 EXHIBIT A.

To the committee on appeals of the board of revision of the city of Pittsburgh:

GENTLEMEN: The undersigned respectfully represents that he is the owner of the following property, situate in the 21st ward of said city; that the board of revision have attached to it a valuation of $ as herein set forth, for taxation for city purposes; that verily believes that valuation to be excessive and beyond the actual value thereof; and that the actual value of said property is as herein set forth:

Description of property.	Assessed valuation.	Owner's valuation.
Eighty acres of land	$240, 000 00	
Two story thirteen room house	2, 800 00	
Frame barn	800 00	
Two story frame & log house	150 00	
Slab stable	50 00	
Shed	100 00	
Milk-house	50 00	
	$244, 000 00	

And further, he therefore needs relief, and appeals from said assessment to your committee, and asks that the assessment be changed so as to conform to the valuation as above fixed by him upon said property, denying your right to tax at all.

JAMES KELLY.

Sworn & subscribed this day of , A. D. 1874.

EXHIBIT B.

Notice.

Please examine that no tax is omitted that you desire to pay. If the list is found to be correct, please sign the order below and return list. The special tax in the 35th ward is one-third of one mill. In the 15th, 16th, 17th, 24th, 27th and 32d wards, three and a half mills, and in the 34th and 36th wards, three mills.

C. L. MAGEE,
City Treasurer.

PITTSBURGH, , 1874.

The following list has been examined and found to be correct. The city treasurer will please make out receipt accordingly:

Ward 21. Valuation: County, $371,380; equalized, $219,600. Name, James Kelly. Water rent of—

Equalized valuation:

	Mills.	
City tax	4	$876 40
City building	¼	54 90
Fire	1	219 60
Special	¼	
W. W. int. and S. F.	1½	329 40
County valuation:		
Poor		158 69
City school		634 76
Ward school		396 73
Business		
Water		
Total		$2,672 48
Discount		133 62
Net		$2,538 62

EXHIBIT C.

No. 417. County, $476.07; State.

Received June 30th, 1874, of James Kelly, esq., . Paid under protest. Total, $476.07, of 21st w'd, Pittsburgh; per cent., 47.60; taxes for 1874 as per margin; amount paid, $428.47.

S. J. FLEMING,
County Treasurer,

(Indorsed:) No. 941. Sept. T., 1874. James Kelly vs. The City of Pittsburgh. In the court of common pleas of Allegheny County. In equity. Filed August 15th, 1874.

To the within-named defendants:

You are hereby notified and required, within fourteen days after service on you, exclusive of the day of such service, to cause an appearance to be entered for you in the court of common pleas of Allegheny County to the within bill of complaint, and to observe what the court shall direct.

Witness our hands at Pittsburgh, this 15th day of August, 1874.

W. H. SUTTON,
Att'y for Comp't.

NOTICE.—If you fail to comply with the above directions by entering an appearance in the prothonatory's office within fourteen days, you will be liable to have the bill taken pro confesso and a decree entered against you.

W. H. SUTTON,
Solicitor for Complainant.

16 *Defendant's answer.*

No. 941, September term, 1874.

JAMES KELLY
vs.
THE CITY OF PITTSBURG.

The City of Pittsburgh, by James Blackmore, mayor of the said city, answering the allegations of the plaintiff's bill, shows:

1st. The allegations of the first paragraph are true.

2d. The allegations of the second paragraph are denied, except that the plaintiff's land is used for agricultural purposes, and that it has not been laid off in lots; and affiant avers, in answer thereto, that said Kelly's land, with the other portion of the city in that neighborhood, was laid off in streets and avenues by councils by a plan approved, 1870; that immediately adjoining the south side of plaintiff's property squares of ground have been laid off in small lots and dwelling and store houses erected upon them; that plaintiff's land has the advantage of Frankstown avenue, which has been graded and paved with wooden pavement to within a short distance of it; of Spencer avenue, which has been graded and runs along a portion of the north side of said land; of streets and avenues, graded and paved, running within a short distance of three sides of complainant's said land; of the city police, stationed in the immediate neighborhood; of water and gas, which run along Penn avenue and within a stone's-throw of complainant's land; of the new water-works now in course of construction, and of all the benefits and protection afforded to life and property by the municipal government.

3rd. The allegations of this paragraph, so far as they are required to be answered, are not true.

4th. The intentions of plaintiff are not gainsaid, but his conclu-
17 sions as to the rights of the city are most respectfully dissented from, and are not correct, as affiant is advised and believes.

5th. The allegations of this paragraph are not denied.

6th. The allegations of fact of this paragraph are denied, and affiant avers, in answer thereto, that the consolidation of 1864, under which complainant's property was brought into the city, has and will be for the benefit of the citizens of the annexed districts, including the complainant, and has and will appreciate the value of their property, including the said land of the complainant.

7th. The conclusions of law as well as the allegations of fact of this paragraph are denied, and in answer thereto the averments of the answer to the second paragraph are set up.

8th. The statement of facts of this paragraph are admitted, except that his said land was not benefitted by the consolidation, or that his so-called farm does not receive any of the benefits of the municipal government, which is denied, and it is averred that, on the contrary, it has been benefitted thereby. Its conclusions of law are denied.

9th. The statements of this paragraph are not denied, except that the city taxes amount to but $1,480 instead of $2,672.00; and if complainant had paid his tax to the city treasurer it would have amounted under existing law to but $988.88.

10th. Affiant cannot answer as to the facts set forth in this paragraph.

11th. The statements of fact and conclusions of law of this paragraph are, as affiant is advised and believes, not correct.

12th. The statements of fact and conclusions of law of this paragraph are, as affiant is advised and believes, not correct.

13th. Affiant denies positively that the increase of valuation of
18 the real estate within the city limits was for the purpose of evading any constitutional provision.

14th. The facts alleged in this paragraph are not denied.

15th. The conclusions and statements of facts of this paragraph are denied as being true, except the fact that the city authorities have laid off streets and avenues over and on said complainant's land, which is true.

16th. Affiant cannot answer as to the conclusions of this paragraph.

17th. The allegations of this paragraph are denied, and it is averred, in answer to part thereof, that complainant's land is assessed at the same rate with that in the immediate vicinity.

JAMES BLACKMORE, *Mayor.*

James Blackmore, being duly sworn, says that the facts set forth in the foregoing affidavit, so far as stated of his own knowledge, are true, and so far as stated from information and belief, he believes them to be true.

JAMES BLACKMORE, *Mayor.*

Sworn and subscribed this day of November, 1874.

(Indorsed:) No. 941, Sept. T., 1874. James Kelly vs. The City of Pittsburgh. In equity. Answer of defendant. Filed Nov. 25th, 1874. Thomas S. Bigelow, solicitor for def't.

19 No. 941, September T., 1874. In equity.

JAMES KELLY
vs.
THE CITY OF PITTSBURGH.

And now, to wit, November 28th, 1874, the plaintiff joins issue on the matter alleged in the answer.

JAMES KELLY,
By W. H. SUTTON,
His Solicitor.

(Indorsed:) No. 941, Sept. T., 1874. James Kelly vs. The City of Pittsburgh. Replication. Filed Nov. 28th, 1874. W. H. Sutton, att'y for compl't.

No. 941, Sept. term, 1874. In equity.

JAMES KELLY
vs.
THE CITY OF PITTSBURGH.

And now, to wit, November 30th, 1874—on motion of complainant, by his solicitor—Tho's MacConnell, esq., appointed examiner and master to take testimony, in conformity to the rules of court in such case made and provided.

By the court.

(Endorsed:) No. 941, Sept. T., 1874. James Kelly vs. The City of Pittsburgh. Order of court ap't'g Tho's MacConnell, esq., master. Filed Nov. 30th, 1874. Sutton for compl't.

20 *Master's report.*

No. 941. September T., 1874. In equity.

JAMES KELLY
vs.
THE CITY OF PITTSBURGH.

To the honorable the judges of the court of common pleas No. one:

I respectfully submit the following report: I met the parties at my office, No. 93 Diamond street, Pittsburgh, on the 5th day of May, 1875, at 3 o'clock in the afternoon, and afterwards, by adjournment, until the 17th of June, 1875, and heard their testimony and arguments. I return said testimony herewith.

The plaintiff charges that he is the owner of eighty acres of land in the 21st ward of the city of Pittsburgh, which, although it is legally within the bounds of said city, it is not within the built-up part thereof; that it has all along been, and still is, used for farm purposes; that he has not laid it off into lots or parcels, or opened streets thereon, or invited or held out inducements to any one to come to or purchase the same, or settle thereon, but that he wishes to retain it for farm purposes until the natural growth of the city requires it to be used for city purposes; that it is not used or needed for city purposes; that no streets, avenues, or city improvements have been made thereon; that large quantities of vacant land lies between his land *his lands* and the inhabited portions of the city; that the city has not filled up its original limits; that the natural growth and developments in extension of the city have not, and he believes will not for a generation to come, need or require any portion of his said lands for city
21 purposes to accommodate her increasing population; that not one single city improvement, convenience, protection, regulation, care, aid, water facility, road or street convenience, protection from fire, drainage, light, schools, benefit, care, or attention has been bestowed on said lands; that his farm has received no benefits whatever from the city, and can derive none; that the city has never expended a dollar for the use or benefit of said farm, or designed to enhance its value, and that he does not expect or require anything from the city, for, as his farm is not needed for city purposes, it is his wish and desire to continue to use and occupy it as he has been doing for farm or agricultural purposes. He further represents that shortly after the act of consolidation was passed, the city had some surveys made, fixing her boundaries and marking and designating where streets might at some future day be made. And in this way he says he is informed and believes defendant surveyed his said lands, but with no present intention of occupying the same for city purposes, or of making city improvements, for they are not required or needed for that purpose, and he believes will not be for fifty years to come. He further charges that his said land was brought into the city without his consent, and with the single purpose and intention of increasing the revenues of the city, without any regard to his property rights or wishes; that the city, by her assessor and agent, has caused his farm of eighty acres to be assessed at $3,000.00 per acre, and, including a few necessary farm improvements, has returned it at an assessed value of $244,000.00, and has levied taxes thereon accordingly, amounting to $2,672.48 city taxes for the year 1874;
22 that the greatest productive income or value of his farm is $10.00 per acre, or $800.00 a year for the whole; that the county taxes

on the land for the year 1874, and which he has paid, amount to $428.44; that as he receives no return from the city for the taxes it has levied on the land, it has no right to levy them, and that the taxes amount to confiscation. He avers that the said assessment and consequent taxes are many times more than the cash or commercial value of the farm, which is not nor cannot be classed as city property; that the assessment is unreasonable and oppressive, and not in keeping with the current value of similar property in the immediate vicinity of and adjoining his farm, and that the valuation is abitrary and an attempt at a gross legal fraud and wrong, and denies that the city has any municipal jurisdiction over said land or farm, or any right to impose taxes thereon for city or municipal purposes whatever. He avers that the city is threatening to enforce the collection of said pretended taxes, and he is informed and believes fully intends to do so unless prevented by the court. He further avers that when he was advised of the action of the city in regard to taxing his land, he made application to the board of revision for grievances and errors in assessments, and protested against the assumption of jurisdiction over his farm lands by the city for city purposes only, when he had paid all county and other taxes on his said land; that he even asked for a reduction, denying at the same time any right in the city to tax his said lands, but his appeal was dismissed and all redress refused him.

23

The answer admits that the plaintiff' land, being eighty acres, is in the twenty-first ward of the city, and was brought in without his approbation and against his will, under the consolidation act. It admits that the land has been used for agricultural purposes and does not gainsay the plaintiff's intention and wishes as to its future use. It admits that the land was taxed by the city, and that, for that purpose, it was valued at $3,000.00 an acre; but it declares that the city taxes amount to $1,480.00 instead of $2,672.00, and that if the plaintiff had paid his taxes to the city treasurer, it would have amounted but $988.85 under existing laws. It admits that the plaintiff appealed from the assessment to the board of revision, but without success. It admits that the city authorities have laid off streets and avenues on and over the plaintiff's land, and does not deny that the city is proceeding to collect the taxes. It declares that the city is unable to answer as to the productive value of the plaintiff's land, and the other allegations and charges in the bill, so far as they are material, it denies.

The general replication of course puts the averments of the answer in issue.

The evidence shows the following facts: Until within the last few years the plaintiff's land was used for farming purposes alone, and for the last few years it has been used for farming and dairy purposes, and is still so used. The yearly rent—the landlord paying all the taxes—was five dollars an acre from 1859 to 1864; eight dollars an acre from 1864 to 1874; and from April 1st, 1874, to the present time, ten dollars an acre, and ten dollars a year per acre is full rent for it.

24

Before consolidation there were two public roads through the land, one the old Frankstown road, the other the Homewood road, leading from the Frankstown road to the Pittsburgh and Greensburg Turnpike, now Penn avenue, and crossing the Pennsylvania Railroad at or near Homewood Station. After consolidation the name of the Frankstown road was changed to Frankstown avenue and that of the Homewood road to Homewood avenue. Apart from this change of name and some surveying and marking, these two roads or avenues remain substantially in the same condition that they were in before con-

solidation, the work done on them yearly since that event being about the same, both as to kind and amount, that it was before. Frankstown avenue is the direct route from the most of Mr. Kelly's land, especially from the part where the buildings are to East Liberty, and consequently to the principal part of the city. From the northern part of his land, the nearest route, I think, would be by Spencer and Lincoln avenues, and from its extreme southern part the route by Homewood and Penn avenues would be but little farther than by Frankstown avenue. Frankstown avenue has been graded and paved, and water and gas have been extended along it to within about three quarters of a mile of Mr. Kelly's land. Lincoln avenue is the old Puckety road; it has been graded and paved out beyond its junction with Spencer avenue, and it is now being paved farther on out. At its junction with Spencer avenue it is some two hundred yards from Mr. Kelly's land. Spencer avenue
25 leads from Lincoln avenue to and by the north side of Mr. Kelly's lands, past Spencer's house to Wilson's line. From that point, as I myself saw on going upon the ground, there is a road through Mr. Kelly's land to Frankstown avenue, a little east of the buildings. This seems not to be a public road, but it is well beaten, and has tracks of wagons or other vehicles on it, showing it is travelled by such vehicles. Spencer avenue has been graded but not paved. It is located on sideling ground somewhat steep, the descent being towards Mr. Kelly's, and in doing the grading a bank was formed on his side obstructing to some extent the direct passage on to the avenue across its edge from the various points of his land.

The land on the north side of Frankstown avenue, between the end of the pavement on it and Mr. Kelly's land, is mostly, almost entirely, agricultural. South of that avenue, and between it and the railroad, the lands appear to be held in smaller parcels, and some of it has been laid off in lots. Daniel McGurk has laid off a plan of lots there, Grazier & Murtland another, and Mellon Brothers another; Grazier & Murtland's plan is bounded on the north and east by Mr. Kelly's land. Some years ago Mellon Brothers laid off a plan of lots, consisting of twenty acres, east of Homewood avenue, adjoining the south side of Mr. Kelly's land, and lying between it and the railroad. Many of the lots in this plan have been sold and built upon. Judge Mellon says it is a little town by itself pretty much. It is not connected with the built-up portions of the city by paved streets, and neither water or gas has been extended to it. The nearest water is on Penn avenue, and
26 the buildings are mostly cheap frame buildings. The facts doubtless are as Judge Mellon states them.

Mr. Kelly's land does not need for the purposes for which it is used water from the city works. That it is sufficiently watered by springs, wells, &c.; that the old roads accommodate the land sufficiently for purposes for which it is used; that the fire department does not act that far out, and could not be made available there for want of water, and that the police do not extend their visits that far out.

Between the Pennsylvania Railroad and Penn avenue the land is mostly occupied in large lots for residences, &c. North of Mr. Kelly's land all the way to the Allegheny River the land is agricultural and very hilly. Mr. Kelly's land is in the same valley that East Liberty and Wilkinsburg are in, and his well being sufficiently well for all useful purposes. Most, if not all, the witnesses examined on the part of Mr. Kelly are of the opinion that Mr. Kelly's land has not been increased but rather diminished in value by having been brought into the city. The city examined no witnesses on this question, or, indeed, on any other,

except Mr. Dempster, the city engineer. He thinks the land has increased in value since consolidation. Some time after the testimony had been closed and the case argued, application was made to me, on behalf of the city, for permission to give testimony on this question, but the plaintiff objecting, I was, under the following authorities, constrained to refuse: Adams' Equity, sec. 384; Daniel Chancery Practice, 1170; Trotter vs. Trotter, 5 Conn., 383; Burgiss vs. Wickersham, 7 R. I., 31, 32.

I return the application herewith.

27 The following is a statement of the taxes assessed by the city on Mr. Kelly's land, as shown by the notice served on him:

City tax,	4 mills	$876 40
City building,	¼ "	54 90
Fire,	1 "	219 60
W. W. int. & S. F.,	1½ "	329 40
Poor		158 60
City school		634 76
Ward school		396 73
Total		$2,672 48
Discount		133 62
Total		$2,538 86

The first four items appear to have been levied on the equalized valuation, which was $219,600; the last three on the county valuation, which was $371,380. The city caused a warrant for these taxes to be issued and put into the hands of a constable, who levied on personal property of William I. Clark, Mr. Kelly's tenant, and advertised it for sale to pay the taxes. The property levied on, Mr. Clark says, was worth over four thousand dollars. The day fixed for the sale was the 3rd of December, 1874, which was after the bill, answer, and replication in this case had been filed and the preliminary injunction refused. On the day of the sale, and when the constable was about to begin to sell, Mr. Kelly, to save his tenant's property from being sold, paid the money, but paid it under protest; Mr. Kelly paid the county taxon this land, being $428.$\frac{44}{100}$, on the 30th of June, 1874, paying them, however, under protest. I re-

28 turn herewith copies of *of* the constable's receipt and advertisement, and of the treasurer's receipt. The amount paid by Mr. Kelly to the constable was only $2,432.68; whereas the taxes, according to the notice served on Mr. Kelly, were $2,672.43. I have no information by which to account for this discrepancy.

Mr. Kelly denies that the city has any right to assess and collect these taxes, and asks the court to restrain it from collecting them, and from levying and collecting such taxes in the future, and *from* general relief. Is he, under the foregoing circumstances, entitled to relief? It is well known to every one that there is a great deal of real estate in this and probably every other part of the country whose market value is very great, while its productive value is very small or even nothing at all. Now the policy of Pennsylvania has been to tax property according to its market value, and not its productive value. That is the only policy that is either practicable or just. If the policy was to tax according to the productive value, a great deal of property, for instance, unseated lands, would not be taxed at all. The 4th section of the act of May 4th, 1841, (Purdon, 1359, section 9.) makes it the duty of the several assessors

and assistant assessors to assess, rate, and value all objects of taxation, whether for State, county, city, district, ward, township, or borough purposes, according to the actual value thereof, and at such rates and prices for which the same would separately bona fide, sell; and the 9th section of the act of the 27th July, 1842, (Purdon, page 1359, sec. 8,) requires assessors and assistant assessors to take an oath, con-
29 taining among others the following clause: "That you will use your utmost knowledge and ability to discover and ascertain all property, real and personal, within your (ward, district, or township,) and all other objects subject to taxation by the laws of this commonwealth, and take an accurate account of the same, and that you will justly and honestly, to the best of your judgment, assess and value every separate lot, piece or tract of land, with the improvements thereon, and all personal property made taxable by the laws of this commonwealth, within your (ward, district, or township), at the rate or price which you shall, after due examination and consideration, believe the same would sell for, if sold singly and separately at a bona fide sale, after full public notice." These provisions are so plain and explicit that they cannot be misunderstood; and they expressly make the market and not the productive value of property the basis upon which it shall be taxed. Mr. Kelly gave me no direct evidence of the market value of his lands; his testimony was confined to its productive value. But while the productive value of property doubtless is, in most cases, some evidence of its market value, in the case of land situated like Mr. Kelly's, within a large city, it is very little if any evidence of it, for we all know that the market value of such property may be and often is very great, while it is to a great extent or entirely unproductive. The averment in the bill by Mr. Kelly, that the assessment of his land and consequent taxes are many times more than the cash or commercial value thereof, &c., is denied by the answer, which puts the burden of proof on him, and the evidence to overcome the denial in the answer must be that of two witnesses, or what is equivalent thereto.

30 Proof that the property is comparatively unproductive, I think, is far from sufficient in opposition to the answer to establish the charge that this assessment is more than the commercial or cash value of the land.

But if Mr. Kelly's land was valued too high for the purpose of assessment, it seems to me he cannot get a remedy therefor in this case. According to his own bill the assessment was made by the city assessor, who doubtless took the oath above quoted. From this assessment he appealed to the board of revision and failed in his appeal. The board of revision was constituted under the third section of the act of the 28th of March, 1872 (Pamphlet Laws of 1872, page 607), and it consists of one person from each ward, elected by the voters of the ward. It has power and is required to alter, revise and equalize the valuations of all taxable property upon such basis and under such regulations as the councils shall direct. Such a body, one would think, would be as likely to do justice to the taxpayers as any that could be devised for the purpose. The legislature seems to have thought so, for it gave no appeal from its decision, and therefore its decisions under the authorities are final. (See Everett's appeal, 21; P. F. Smith, 218; Stewart vs. Maple, 20; P. F. Smith, 223; Clinton school district's appeal, 6; P. F. Smith, 317, and Hughes vs. Kline, 6; Casey, 227.) In the Clinton school district's appeal, Agnew, J., says, "All the cases assert the doctrine that when the general power to assess exists the proper remedy for illegal taxation is by appeal to those to whom the appeal is required to be taken, and if

none be given, neither the common pleas nor this court can re-
31 verse the judgment of the tax officers. Indeed it would be a most ruinous consequence if, just when the tax collector comes around with a warrant to demand taxes assessed in due form of law by those having a general power to tax, a court of equity could interfere by injunction, on the ground that the tax officer had omitted or refused to allow a special exemption. As well remarked by our brother, Thompson, in Hughes vs. Klein, 'It will not do to permit the collector of taxes to be interfered with by such process unless in the clearest cases of want of jurisdiction in the assessing and collecting officers.'" In Kimber vs. Schuylkill County, 8 Harris, 368, Chief Justice Black says: "The judges when hearing these appeals are acting as assessors of taxes. We venture to hope that it will be many years before we will be called on to review the assessments of every man in the commonwealth who is dissatisfied with the taxes charged against him." I think your honors might venture to express the same hope in regard to being called on to review the assessment of every man in our cities and county who is dissatisfied with the taxes he is called to pay.

But Mr. Kelly asks relief on the ground that the assessing officers had no jurisdiction to make the assessment, and he denies their jurisdiction on the ground that the city gives him no equivalent for the taxes it undertakes to impose; that he receives no benefit from the city government, and therefore is not, of right, taxable for its support.

In the Pittsburgh, Fort Wayne and Chicago Railway Com-
32 pany vs. The Commonwealth (16 P. F. Smith, 75) Judge Pearson says: "The principle of taxation is correlative with protection," and The Borough of Carlisle vs. Marshall (12 Casey, 397) is cited in support of this position. Admitting the principle stated by Judge Pearson to be correct, the difficulty seems to be in applying it to particular cases. What amount of protection will confer the right to tax? When the right to tax is given and the duty to protect is imposed by law, does the right remain in abeyance until the duty is performed? Can the non-performance of the duty be set up as a bar to the exercise of the right? The city having the right to tax property within its limits for municipal purposes, can the property-owner escape from paying his taxes on the ground that he has not received from the city the protection which the law required it to afford him? If so, would the failure to perform the duty be required to be total, or would a partial failure be sufficient; where would the limit be? In this case Mr. Kelly's land is real estate within the city; the city has a general power to tax real estate within its limits for municipal purposes. Has he a right to escape from paying his taxes because he has not received from the city the protection the law entitles him to, even if it had failed to afford him such protection? Would the courts restrain the collection of the taxes on such grounds? If they would do so for Mr. Kelly, would they not have to do so for every other property owner in the city who thought it had not accorded to him the protection or benefit the law enti-
33 tled him to, and who applied to the courts for relief? Would not such a course on the part of the courts, besides being incalculably troublesome and onerous to themselves, be a most perilous one? Might it not result in a total suspension of the city government? Is not the property owner's remedy in such a case, not the refusal to pay his taxes, but an action at law against the city for the damage he sustained by reason of its negligence or misconduct?

It may be the theory of our government that taxes should be equal; that is, that they should be in proportion to the benefits which the

several taxpayers receive from the taxing powers. But if it is, all experience proves that it cannot be carried out in practice. In Green vs. Weisenberg School District (7 P. F. Smith, 437) Judge Sharswood says: "Perfectly equal taxation will remain an unattainable good as long as laws and government and men are imperfect"; and he says, in Weber vs. Reinhard (23 P. F. Smith, 373), that "there is no provision in the constitution that taxation shall be equal. Sound policy requires that it should be so as far as possible, but perfect equality is not possible. Indeed, if this were necessary, there could be no taxation except such as would include every person and everything, which would manifestly be impracticable and unjust"; and, on page 374, speaking of the case of Philadelphia Association vs. Wood (3 Wright, 73), he says that in that case, "the idea that a court could pronounce a tax unconstitutional on the mere grounds of injustice or inequality was expressly repudiated."

In Robinson vs. The County of Allegheny (7 Barr, 164) Judge
34 Rogers says: "All considerations of hardship or inequality must be left to the legislature; with that we have nothing to do. But it must be observed that complete equality cannot be expected; all we can hope for is an approximation to it, and this can only be produced by the taxation of a variety of articles and the operation of time, which causes greater equality than is generally supposed." In Sharpless vs. Philadelphia (9 Harris, 169) Ch. J. Black says: "It is the theory of a republican government that taxes shall be laid equally in proportion to the nature of the property, and when collected shall be applied only to purposes in which the taxpayers shall have an equal interest. But this is impossible even in the simplest state of society, and becomes more and more difficult in proportion as a higher civilization diversifies the character, circumstances, and pursuits of the people. * * * No county or municipal tax ever comes up to this theory, and the taxes now levied by the State are a grievous violation of it. The improvements made by the commonwealth added largely to the fortunes of some, to others they did no service, and some were even injured by them. It is not every inequality of burden or benefit, not every disproportion between the same which a citizen pays, and the interest which he, as an individual, has in the purpose to which it is applied, that can make a tax law void. I am of opinion with the supreme court of Kentucky (9 B. Monroe, 345), that a tax law must be considered valid unless
it be for a purpose in which the community taxed has palpably
35 no interest, when it is apparent that a burden is imposed for the benefit of others, and that it would be so pronounced at the first blush."

That Mr. Kelly and his neighbors have to pay taxes that are much greater than the productive value of their lands is unquestionable; their case is therefore a hard one. But it is only that of thousands of others all over the land, who own property the market value of which is great, while its productive value is small or nothing at all. In such cases, hard as they doubtless are, the courts can afford no relief. The property owners, if they can, must relieve themselves by applying their property to such uses as will bring its productive and market values into a fair proportion. If they can do this and will not, but will persist in placing extravagant prices on their property for selling purposes, while its productive value is very small or nothing, they have only themselves to blame and must take the consequences. If they cannot relieve themselves by bringing the market and productive values of their property into something like reasonable proportions, their only recourse is to the

legislature, I think, to get the law so changed that it will operate less severely and more equitably upon them. As the law now is, the assessor has nothing to do with the productive value; he has nothing to do with the purposes for which the property is used, or for which the owner wishes or intends to use it in the future. His duty is to ascertain in the way prescribed by the statute the market value of the property as it is at the time, and assess accordingly. This is what the law and his oath require him to do; anything else would be a violation of both.

36

Mr. Kelly's land is within the city. It had two public roads through it when consolidation took place. They are there yet. When consolidation took place, it became the duty of the city to keep those roads in repair and improve them if necessary; there was authority for these purposes nowhere else. For this purpose the city got power to assess and collect taxes, and no power to do so was left anywhere else. It alone had the duty to perform; it alone had power to procure means for performing it; no power on earth except the city could or can tax the land for highway purposes, whether the highways are called roads, streets, or even avenues. If the city cannot tax this land for highway purposes, it cannot be taxed for them at all; and it then would follow that while all other lands in the county had to pay taxes for highway purposes, this land would have to pay none; and what is still worse, while it would be exempt from taxation for highways, the other property in the city would have to be taxed to keep up the highways *the other property in the city would have to be taxed to keep up the highways* through it. When the city taxed Mr. Kelly's land for highway purposes, it did just what every city, borough, and township in the commonwealth does in regard to the lands within their several limits. If the city does not expend on his land, or for his benefit, an equal proportion of the taxes, he is just in the same predicament with more or less people in every city, borough and township in the State. I am sure there is not a city, borough, or township in the State in which the taxes for highways are applied for the benefit of the tax-payers in proportion to the taxes they severally pay. If the assessment of taxes is to be declared illegal, and their collection prevented by the courts, because there is a probability or even certainty that when collected they will be applied more for the benefit of some of the taxpayers than others, there will be an end to the collection of taxes.

37

The cases I have already cited show that the law does not require taxes to be applied for the benefit of the taxpayers in proportion to the taxes they severally pay, and it does not require it, simply because it is impossible.

What I have said of taxes for streets, roads, or highways may be said with equal propriety of school taxes and poor taxes. If the city authorities cannot tax Mr. Kelly's land for those purposes, no other authorities can, and it will escape taxation for those purposes altogether.

The 19th section of the act of April 1st, 1868, provides that all real estate situated within the districts of Oakland, Pitt, Peebles, Liberty, and Collins townships, except so much of Pitt township as lies north of the Pennsylvania Railroad, between the line of the ninth ward and boundary st., shall be marked "rural," and there shall be assessed and collected thereon two-thirds of the rate of city taxation that may be assessed and collected upon other real estate within said city. Mr. Kelly's land is within the district to which this act applies, and is entitled to the benefit of it. Whether the city gave it the benefit of the act in assessing the taxes for 1874 I am not in-

38

formed. Similar acts relating to Philadelphia were before the Supreme Court in the case of Sewell vs. The City of Philadelphia, 2 Wright, 255, and Judge Woodward says by these acts "Lands within the city of Philadelphia which the assessors marked 'rural' were taxable only two-thirds the rate of city taxes assessed on other real estate in the city, one-third being released because rural owners desired no benefit from lighting, paving and cleaning streets, &c. The like release in the act of 1868, in favor of the owners of real estate in the rural districts of Pittsburgh, was doubtless given for the same reason. In providing for the release of one third, the legislature exercised its judgment, and it was held in the case of Pittsburgh vs. Kitty Roup, if I understand that case, that it had a right to do. It may not have made the release all that equality and justice required; but the court, I think, cannot pronounce the law void on that ground." In Philadelphia Association vs. Wood, 3 Wright, 381, Chief Justice Lowrie, speaking of the matter then before the court, says, "If this is taxation, we do not see how we can pronounce it unconstitutional merely on the ground of inequality, for that is unavoidable. Approximate inequality is all that is to be expected." In Weber vs. Reinhard (23 P. F. Smith, 374), as I have already shown, Judge Sharswood quotes this language approvingly, and says that in that case the idea that the court could pronounce a tax unconstitutional on such grounds was expressly repudiated.

39 In Robinson vs. The County of Allegheny (7 Barr, 164), Judge Rogers says: "All considerations of hardship or inequality must be left to the legislature; with that we have nothing to do." In Sharpless vs. Philadelphia (9 Harris, 169), Judge Black shows, what, indeed, we all know, that property owners in the State who were actually injured by the State improvements, were taxed to pay the debt to make these improvements as well as those who were benefitted by them; and yet nobody, so far as I know, ever thought of calling in question the constitutionality of the laws by which those taxes were imposed.

In the second paragraph of his bill the plaintiff avers, among other things, that no road or street conveniences has been bestowed on his land. This is denied in the answer. As I have said, Franktown and Homewood avenues pass through the land, and the testimony shows that other streets have been surveyed through it.

The 6th section of the act of Jan'y 6th, 1864, authorized councils, whenever they might deem the same necessary, to cause to be graded, regraded, paved, repaved, or macadamized any public lane, street, or alley or any parts thereof which was then or might thereafter be laid out and opened in said city, or which might be, in whole or in part, boundaries of said city, and to have the same set with curbstone; and the said councils were thereby further authorized to levy and collect the cost or expense of the same from the owners of property abounding or abutting on the portions of said streets, lanes, or alleys thus
40 improved, by an assessment of an equal sum per foot front of said properties. But the act of April 1st, 1868, section 11, provides that no street or highway shall be opened, graded, or paved under said laws in any part of the territory consolidated with said city under the act to which the last-mentioned act is a supplement, unless upon the written application of a majority in interest of the owners whose property is situated or abuts thereon, &c. By this act the city is prohibited from opening, grading, or paving any street through or leading to Mr. Kelly's lands, unless upon the written application of a majority in interest of the abutters on the parts so to be opened, graded, or paved. Mr. Kelly does not allege in his bill that any such application was ever

made to the city to have Frankstown avenue, from the point to which it has been graded and paved, or Homewood avenue, or any other road or highway leading to or through his land, opened, graded, or paved, or that the city has neglected or refused to comply with such application, and in fact no such application was ever made.

Mr. Dempster, the city engineer, testifies that Mr. Kelly could have said streets opened and improved if he so desired, and that if they were opened it would be possible to extend the water mains to his property, so that he could have the immediate use of the water. Under these circumstances I cannot think that the city is to be blamed for not opening and improving those streets, nor can I think it is to be blamed
41 for not having water and gas pipes laid along them before they are graded. It is shown that the city has done some work towards keeping the roads through Mr. Kelly's land in repair. If it has not done as much work on them as the law required it to do, and he has been injured thereby, I think his remedy is not by refusing to pay his taxes, but by an action at law for damages.

But Mr. Kelly does not want streets opened to or through his land; he does not want them graded or paved, and he does not want water or gas. He wants to use his land as a farm and apply it to no city purpose. He alleges that for farming purposes his lands need no city improvements, and therefore it ought not to be taxed for them. He asks nothing from the city, and he wants it to ask nothing from him. He asks exemption from taxation for city purposes, on the ground that he is not interested in the objects to which the taxes are to be applied, and therefore gets nothing in return for the taxes. Mr. Kelly's land was, up to consolidation, in close proximity to the city. Its value, therefore, depended on the growth and prosperity of the city. As the city grew and prospered the value of this land increased until it became very great. It was then brought into the city and made part of it; but its value still continued to depend upon the growth and prosperity of the city. To arrest the prosperity of the city would be to seriously affect the value of the land; to destroy that prosperity would be
42 to a great extent to destroy that value. The prosperity of the city depends on its streets being kept in repair, and its water and gas and educational facilities being ample. Without these it would fall into decay, and the value of all the real estate in it, including Mr. Kelly's, would incalculably be reduced. The city cannot keep the streets in repair and furnish an adequate supply of water and gas, and educational facilities without money, and the only way it can raise money for these purposes is by taxation. It seems to me, therefore, that the idea that Mr. Kelly is not interested in the objects to which the taxes are to be applied, and that he receives no benefits in return for the taxes, is a mistaken one, even if he received no special benefits from the application of the taxes; and the idea of taxing unproductive property according to its market value is confiscating it, or taking it for public use without compensation, I think, is equally a mistaken one.

The charge in the plaintiff's bill that the assessment of his lands is not in keeping with the current value of similar property in the immediate vicinity of and adjoining it, and that the valuation is arbitrary, and an attempt at a gross legal fraud and wrong, is denied in the answer, and I think the evidence does not sustain it in the face of that denial. The same I think is the case with the charge that the consolidation by which the plaintiff's land was brought into the city was procured by the city with the single purpose of and intention of increasing her revenues without any regard to the property rights or wishes of the

plaintiff, and without any pretext of extending to him any municipal benefits of any kind, &c.

43 It seems to me entirely immaterial in this case whether the original limits of the city have been filled up or not. I think the courts would not undertake to prevent the improvement and filling up of the new parts of the city until the old parts are filled up, or prohibit the city from taxing the new parts for that reason.

The learned counsel for the plaintiff referred me to several Kentucky and Iowa cases, showing what is the law in those States in regard to taxing lands situated like those of Mr. Kelly. If the law was the same in Pennsylvania that it appears to be in those States, perhaps Mr. Kelly would be entitled to the relief he claims, but I think the law is different in Pennsylvania. Still, under the law in Iowa, I doubt whether the plaintiff's land would escape taxation for city purposes. In Mitchell vs. Davenport (34 Iowa, 192), decided in 1872, Chief Justice Beck says: "There would neither be reason nor justice in permitting a proprietor of a large tract of land within a city to hold it for an opportunity to bring it into market as city lots, and for no other purpose, under the pretence that it is agricultural lands, thus escaping taxation for the general improvement of the city, the very thing that will bring his lands into market and thus add greatly to their value—a direct benefit to the owner. In such a case the general improvement of the city, the building of streets near or in the direction of the lands so held, the construction of water-works, public buildings, &c., &c., by

44 which the prosperity of the city is advanced, and an invitation to population is held out, all bestow direct benefits upon the owner of such property, the lands being a part of the city in fact, and held by the owner for the increase in value which he expects, because they are city lots and benefited by the city government, and share in the benefits derived by the expenditure of the revenue raised by taxation. If property be so held within a city, whether it be subdivided into lots and streets thereon are dedicated to public use, or been closed and cultivated as agricultural land, it ought to be subject to general municipal taxation. This result is directly deducible from the rule established by the decisions of this court." Under such a rule it seems to me Mr. Kelly's land could not escape from general municipal taxation.

Mr. Kelly's case is doubtless a hard one, as is that of his neighbors in like condition, but I think the courts have not power to relieve him; the legislature alone, I think has the power to do it. In Robinson vs. The County of Allegheny Judge Rogers says: "All considerations of hardships and inequality must be left to the legislature; with that we (meaning the courts) have nothing to do." I think, therefore, that the bill must be dismissed with costs; all of which is respectfully submitted.

T. MACCONNELL, *Master.*

AUGUST 7TH, 1875.

Master's fee $400, paid by T. S. Bigelow, esq., city att'y.

45 On the 7th of August, 1875, I gave notice to the attorneys of the parties of the making out of this report. The city of Pittsburgh filed no exceptions thereto. Messrs. Sutton, on the part of the plaintiffs, filed exceptions thereto on the 17th day of August, 1875, which exceptions I return herewith, and on consideration thereof do overrule them.

T. MACCONNELL, *Master.*

SEPTEMBER 3D, 1875.

(Endorsed:) No. 941. Sept. T., 1874. James Kelly vs. The City of Pittsburgh. Master's report. Filed Sept. 4th, 1875.

46 No. 941. Sept. term, 1874.

JAMES KELLY
vs.
THE CITY OF PITTSBURGH.

Complainant excepts to the report of Thos. Macconnell, esq., as master in this cause, and showeth:

First. Complainant excepts to the master's report of facts as wanting in the certainty justifiable by the direct allegations of the bill, and the weight and character of the evidence, defendant having introduced no evidence controverting any of complainant's allegations, or in support of the issue raised by the answer. The master should have found, directly and positively, that all the material allegations of complainant's bill were sustained.

Second. Complainant, under the facts as set forth in his bill and the evidence thereon, denies the right of the city of Pittsburgh to subject the land in question to taxation for municipal purposes, claiming that such exercise of the taxing power by the city of Pittsburgh is in violation of section 10 of article 1 of the constitution of the commonwealth. The constitutionality of the entire tax as levied for municipal purposes, and not errors of assessment or irregularities of burden arising therefrom, constitutes the issue, and the master, in his report of his conclusions of law, should have confined himself to the material issue. Complainant therefore excepts to all that portion of the master's report relating to the law regulating assessments and authorities cited thereon, as also to all that portion of said report relating to the authorities cited on inequalities of taxation, as not bearing upon the issue, and, being
47 irrelevant matter, tending to encumber the record and embarrass the real issue, should therefore be stricken from the record.

Third. The master finding from the evidence the fact that the city does not extend to this property the considerations which the supreme court of Pennsylvania have held to be the essential requisites to justify the exercise of the taxing power for either general or local purposes, the master should have found as a legal consequence that complainant's farm was not liable to taxation for municipal purposes, and therefore entitled to relief from the following taxes, as stated in the city's statement of assessments, as set out in the master's report, to wit:

City taxes,	4 mills	$876 40
City building,	¼ "	54 90
Fire	1 "	219 60
W. W. Int. & S. F.	1½ "	329 40
City school		634 76

Fourth. The master finding complainant's farm land unchanged by and receiving no benefit from consolidation, the master should have found that said farm lands were subject to taxation for only such purposes as the same were subject to previous to consolidation, or that similar property is subject to without the city boundaries, and by the act of consolidation the municipal authorities became and were ex officio authorized to collect and disburse the same.

Fifth The issue raised by complainant's bill, resting upon a provision of the constitution of the State of Pennsylvania identical with the provision in the constitution of the State of Kentucky, and the supreme
48 court of Pennsylvania having adopted the construction put upon

this provision by the supreme court of Kentucky, the complainant, therefore, excepts to the conclusion arrived at by the master "that the law is different in Pennsylvania" as being unsustained by either evidence or authority.

Sixth. Complainant excepts to the quotation made by the master of the rule adopted by the supreme court of Iowa in the case of Mitchell vs. Davenport, 34 Iowa, 192, as setting forth but a portion of said rule, and the portion so quoted by the master is not applicable to the facts as set forth in complainant's bill and the evidence adduced before the master.

Seventh. Complainant excepts to the entire theory, understanding and treatment of the material issue, as set forth by the master in his report, and he likewise excepts to the finding and the decree in toto as rendered by the master.

W. H. AND A. N. SUTTON,
Attorneys for Compl't.

(Endorsed:) No. 941, Sept. T., 1874. James Kelly vs. The City of Pittsburgh. Compl'ts exceptions to master's report. Aug. 17th, 1875. T. Macconnell, master. Filed Sept. 4th, 1875. W. H. & A. N. Sutton, att'ys for compl't.

49 *Notes of testimony.*

No. 941. Sept. term, 1874.

JAMES KELLY
vs.
THE CITY OF PITTSBURGH.

PLAINTIFF'S TESTIMONY.

SAMUEL CHADWICK, sworn on part of complainant, says:

I am a resident of the 21st ward of the city of Pittsburgh, and have resided in the same place since 1849. I am acquainted with Mr. Kelly and know something about the city of Pittsburgh. I know the land owned by James Kelly situate in the 21st ward of said city of Pittsburgh, and described in the bill filed in this case as situate in formerly Collins Township, bounded by lands of Spencer and Dr. Wilson on the north; west by the lands of McComb's heirs; south by the lands of heirs of Wm. Elliott, owned in part now by Tho's Mellon; and on the east by line of Wilkins Township and other lands of James Kelly, and within the consolidated limits of the city of Pittsburgh. I know that these lands have been used and occupied as farm lands ever since I have known them and are so used and occupied at the present day. I have been in the habit of seeing the lands every two or three days. There are no buildings or improvements on the place other than those suitable for farm purposes. The city of Pittsburgh has not laid off the said property by streets, lanes, alleys, or lots that I am aware of, with the single exception of having made a survey and set up marks to the several divisions and participations of the same; but there is no visible evidence of any of the streets, lanes, or alleys being opened; and all that I know about there being a survey is that one day in the cars one of the
50 surveyors showed me a plot of streets and alleys that run through this land of Mr. Kelly's. Spencer avenue, so far as it has been opened and worked upon, touches upon the north side of this piece of

property of Mr. Kelly; this street runs along the north front of this property in the neighborhood of about forty rods; there is no other city improvement upon or touching this land that I am aware of. Frankstown avenue, which is the old Frankstown road, runs through this land, to which there has not been any improvements made other than would be done by township officers.

The land adjoining this on the west side, and belonging to the McComb's heirs, is used as a farm. The whole of the McComb's tract, containing about 45 acres and lying immediately west of Mr. Kelly's lands, and between him and the city of Pittsburgh, is used as farm lands, with no city improvements except the same survey heretofore referred to. South of the Frankstown road and still west of the Kelly lands, and belonging to Murtland and Grazier, containing 16 acres with the exception of a small portion south of the run, is used as farm lands. South of the said land of Mr. Kelley's there is 18 or 20 acres bought from Miller by Tho's Mellon; was laid out by him in lots and partly built upon; this piece of land bought by Mr. Mellon lies adjoining the Penn'a Railroad; the grounds south of the Penn'a R. R. opposite Mellon's belong to B. L. Fahnestock, 14 acres; Mr. Miller, 12 acres; Mr. Dietrich, 10
51 acres; and in Mr. Rich's two pieces, one north and the south of the railroad, containing about 49 acres, are all used for farm purposes. East of Kelly's land is the city line—that is, the city line runs through Mr. Kelly's land, throwing about 80 acres into the city; there is no difference in the use of the Kelly land that is thrown into the city from that part of the tract that is left out of the city; and all the lands east of the city line is used for farm purposes. North of said Kelly's land is one tract belonging to Jno. Wilson of 43 acres, and a little corner belonging to John Crawford; and 14 acres belonging to Jos. Spencer; 4 acres to Wilhelm; 9½ to the Lawrence nurseries; these are all agricultural lands and used for agricultural and horticultural purposes; all that body of land running along the line of the city of Pittsburgh and Penn Township, and the Allegheny River, and lying west of that down to Finley's Run, thence down that to Negley's Run, and from Negley's Run to the river, comprising a large part of the 21st ward, is agricultural lands.

Mr. Kelly's land is all lying level and nice, and brings the highest rental price for that quantity of all the land that has been mentioned; in all that boundary there is not another 80-acre tract that will bring as high a rental as that of Mr. Kelly's. I have understood from Mr. Clark, who is the tenant of the largest portion of that 80 acres, that he pays $10 an acre rent per year; I cannot say how long he has paid this rent for it; I do not know of any other farming lands in the neighborhood that
rents for that much; I pay Dr. Wilson $170 a year rent for 43
52 acres that lies on the north of Mr. Kelly's 80 acres. I do not know of any other purposes that these lands could be appropriated to that would bring in more money than this. So far as I know Mr. Kelly has never laid out this 80 acres into lots or appropriated them to city purposes in any manner whatever; gas or water has never been extended into this property of Mr. Kelly's, nor can the fire department be of any use on any part of it. I do not know if the city expended any money for the benefit of this land; I think Spencer ave. does not benefit this land of Mr. Kelly's in any manner.

SAMUEL CHADWICK recalled and cross examined by Mr. Bigelow:

There is a portion of the ground south of Mr. Kelly's land that is laid out into lots and streets, called Homewood, and is a portion of the city

and built upon. There are two stores that I know of, perhaps three, two grocery stores, and a drug store, and a goodly number of small dwellings. Penn avenue runs about parallel with the south line of Mr. Kelly's land to the city line; that avenue has been graded and paved; it was opened on the 4th of July, 1873, I believe. It is paved out to the consolidated city line. There is a street or avenue called Brushton avenue, I believe, that extends from Penn avenue up to Mr. Kelly's land; this avenue, at its junction with Penn avenue, is the boundary line of the city, but nearly opposite Mr. Brush's residence the city line leaves it.

I know Homewood avenue; I know it is opened up from Penn avenue to Frankstown avenue. I would say, on a venture, that it a good half mile from Penn avenue to Mr. Kelly's land. Frankstown avenue has been graded and paved with the Nicholson pavement up to about
53 three-quarters of a mile from Mr. Kelly's land; I never noticed the distance correctly; it is paved up to Mr. Finley's place. The brick police station is on Frankstown avenue near the west end of that avenue; it is built close to the ravine that is the dividing line between the 19th and 21st wards; it is west of the 21st ward school-house; it is located in the 19th ward; water could be taken out to this when the new water-works are completed by continuing the pipes out to it.

Redirect by Mr. SUTTON:

Homewood avenue is old Homewood lane, and is in about the same condition that it was when opened. It is the old township road. It has never been graded or paved. If water were conducted to this land it would not be of use to the farm for its present purposes, as it is adequately watered with springs. There is an abundance of water, but I think Clark and Lamont use wells. Clark's principal pasture is watered by a run, a branch of Finley's Run. I know of no occasion for police protection over this land. I never heard of any being called for. I think the fire department could not be made available for the protection of the buildings on this place from fire. If the engines got there they would have no water.

SAMUEL CHADWICK.

JOHN F. MCCOMBS, called for plaintiff and sworn, says:

I live in Wilkins Township, adjoining these 80 acres of James Kelly. The farm I live on joins lines with Mr. Kelly's. I have known this land of Mr. Kelly for, say 40 years, indeed all my life. It has
54 been used for dairy purposes for the last twenty years. Before that it was used for agricultural purposes. It has never been laid out into lots by its owner, nor has he laid out any streets through it. The city has run lines for streets through it, but none of them have been opened. This surveying has made no change in the appearance of the property, or in the way in which it is used. The city has not graded or paved any of the streets running to or through Mr. Kelly's property; and this morning the road to it is almost impassable with mud. The city has not carried any of its conveniences to, on, or along this property.

I am acquainted with all the property adjoining this land of Mr. Kelly. The said adjoining property is all used for agricultural purposes except a small portion of Mellon's plot at Homewood; all the rest is agricultural land. For the present purposes of the property the city conveniences are of no use, and they would be of no use if they were carried there. The property is abundantly watered without them.

A body of land like that of Mr. Kelly's cannot be rented for more than ten dollars an acre per annum for the purposes for which it is used. I have fifteen acres adjoining this which I rent for more than ten dollars an acre, but it is for garden purposes. A tract as large as that of Mr. Kelly could not be rented for such purposes. It could not be rented for more than ten dollars an acre. There is a large body of land lying between this land of Mr. Kelly and the city. These are the McComb's tract, 60 acres, the Ferry property, and others between
55 it and the city, all of which is used for agricultural purposes.

Cross-examined by Mr. BIGELOW:

I am a son-in-law of Mr. Kelly, the plaintiff.

JOHN F. McCOMB

JAMES M. ROWAN sworn on part of complainant:

I am acquainted with the lands of Mr. Kelly in the 21st ward, Pittsburgh, and have been for some time. I own land in the neighborhood. I use my land for agricultural purposes. I know Mr. Kelly's land is used for agricultural purposes. I understood that Mr. Kelly's land was rented for $10 an acre. I think $10 an acre is about what could be obtained as rent for lands in this neighborhood used for agricultural purposes. I do not know that the city of Pittsburgh has extended any of her improvements, such as water, gas, police, fire department, &c., to Mr. Kelly's land. I know that she has not done so. I think Mr. Kelly's land is abundantly supplied with water and roads for agricultural purposes. These roads are old country roads that have been taken possession of by the city, and upon which no improvements have been made. The land adjoining Mr. Kelly's on the north, west, and south lies in bodies and is used for agricultural purposes, and it is bounded on the east by the *by the* city line. The fire department of the city of Pittsburgh cannot be made available to Mr. Kelly's land in case of fire, for the reason that there is no water. The nearest water is on Penn avenue. I believe Penn avenue is distant from Mr. Kelly's houses on this land about three-quarters of a mile. I do not know of the
56 necessity or use of police force being called upon or for in that neighborhood. The city does not keep any police force there. I do not know of any benefits that have accrued to this land since it has been brought into the city. It cannot be used for any other or better purposes since it was annexed to the city than it was before, and no greater revenue been given thereby. Lincoln avenue is the old Puckety road, except in some little changes, but it does not touch this property of Mr. Kelly's.

J. M. ROWAN.

SAMUEL B. ROSS sworn on part of complainants.

I have lived in this neighborhood all my life. I know this property of Mr. Kelly's. I have known it at any rate for forty years. It has been used for agricultural and dairy purposes all the time I have known it. I have known lands simllar to this in the neighborhood rent for $10 an acre per annum. The McGurk farm north of this and owned by Shoenberger & Co., and containing 112 acres, rented for $500 per annum.

The city of Pittsburgh has not extended to this property any of her municipal improvements, such as paved streets, water or gas. The nearest water and gas to this property is on Penn avenue, which is two-thirds of a mile from it. Homewood and Frankstown avenues are the

old township roads. Frankstown avenue was the Frankstown road. Homewood avenue was the old Homewood road, changed in name, but the same as they were before being brought into the city. I think these roads are sufficient for all purposes of this place. They were be-
57 fore the place was taken into the city, and I cannot see that it needs any more now. The place for its present use does not need water and gas, I think. The city does not keep a police force there. I have never seen any there. There is none wanted or needed for the place.

I am acquainted with the lands adjoining Mr. Kelly on the north, west, and south. North there is a large body of land running to the Allegheny River, along the city line from Negley's Run, that is used for agricultural purposes. There is more than a thousand acres north and west. On the south is the little town of Homewood, laid out by Judge Mellon. It is built up mostly of cheap houses. It faces on the railroad.

I have seen the place where Spencer avenue joins Mr. Kelly's land. Mr. Kelly's land is not accessible by it for the reason that it has a high embankment. It is cut in on the side of a hill, and a heavy fill on the lower side. This avenue is not required for the use of the farm even if it could be used.

SAMUEL B. ROSS.

JAMES M. ROWAN recalled for complainant.

I know where Spencer avenue joins Mr. Kelly's land. Mr. Kelly's land is not accessible from this avenue. It is not needed for the uses of the farm even if it could be used. Where it passes along Mr. Kelly's land it is a steep hill-side. In making the road they dug it along the hill-side and threw the clay over on Mr. Kelly's land, making it so steep that you cannot get up to it. It is not paved. It is just a clay road.

J. M. ROWAN.

58 WILLIAM J. CLARK sworn on part of complainants.

I am acquainted with this land of Mr. Kelly's, and have been so for about 25 years. I have lived on a portion of it for over 15 years. It has been used for dairy and farming purposes during that time. I do not know of any farm in the immediate neighborhood rented, except the farm Mr. Ross spoke about—the McGurk farm. When we went onto the farm we paid $5 an acre for it. This was in 1859, April 1st, and we paid $5 an acre up to 1864. Then we paid $8 an acre up to about a year ago from the first of last April, 1874. Since that I have agreed to pay him $10, telling him that it was as much as I could afford to pay.

The city of Pittsburgh has not carried any of her municipal improvements up to this place, such as paved streets, water, or gas. It has been of no benefit to the place. The Frankstown avenue and Homewood avenue, running through the place are the old Frankstown road and Homewood road, unchanged.

I think Penn avenue is the nearest paved street to this place, and it is about, I should judge, two-thirds of a mile distant. That is the nearest water, gas, or paved street. I should judge it was from three-quarters of a mile to a mile from the end of the pavement on Frankstown avenue to this place. The road between this place and the pavement is very bad. These roads are sufficient for all the uses of the farm. The fire department is not available in case of necessity. It is of no benefit to us. If they got an engine there they could not use it

59 from want of water. I am not positive that there is water on Penn avenue at junction of Homewood avenue now. I know that during the winter there was no water at that point at times. The buildings on this place are old style frame buildings. The city of Pittsburgh does not send her police force out to this place. There is no need of them, and they are not required at all.

On the north side of our place it is entirely used for agricultural or farm purposes. Some of the land is good, other is hilly. On the west side of it, until you come up to Finley's, about a mile, is agricultural land, except a few lots that have been laid out and sold by Dan. McGurk, and on the south Judge Mellon has laid off a piece, about 20 acres, into lots, almost all of which has been sold and built upon with cheap houses. Rich's land is all vacant, and farm land. Rich has about 45 acres, I believe. This little town of Homewood lies on the railroad and Homewood lane. I am still a tenant of Mr. Kelly's, and occupy this land. My personal property was seized and advertised for sale last fall for the taxes of this place. It was for city taxes. I believe the taxes assessed against this land, and which Mr. Kelly paid in my house, was, I think, $2,430 odd dollars, to get the release of my personal property.

Spencer avenue joins the land of Mr. Kelly on the north side. Spencer avenue stops just at the end of Spencer's property. It has no other connection. There is no road open to this avenue. In cutting down the hill to make this avenue they threw the dirt over on Mr. Kelly's land. It was left almost perpendicular touching Kelly's land.

60 I consider that Mr. Kelly's land is damaged by it. There is no practical communication between Spencer avenue and Mr. Kelly's land.

The lands lying west of Homewood avenue is mostly agricultural lands. The land lying between the railroad and Penn avenue, along Homewood ave. and west of it, is suburban lands.

Mr. Kelly's land, since it was taken into the city, remains precisely the same as it was before it was taken in. To the best of my knowledge there has not been any increased demand for this property since it was taken into the city. I would not be willing to pay as much for the lands since they were taken into the city as before, from any return of benefits made by the city. I do not know of any benefits of any kind that have accrued to these lands since they were taken into the city. They have changed nothing; improved nothing. I could not, as a tenant, possibly pay the taxes on these lands and support myself. I would not be willing to pay the one-half of them. My rent hardly amounts to one-third of the taxes. I have nothing to do with the taxes. Mr. Kelly has to pay them. I have kept up the fences, except where new materials are to be used; then Mr. Kelly has to supply the material and pay for putting it up.

WM. JAS. CLARK.

GEORGE FINLEY, Esq., called for plaintiff and sworn, says:

I know James Kelly; have known him since I was a child. I know something of the city of Pittsburgh. I know the 80 acres of land belonging to Mr. Kelly, and described in his bill in this case. I

61 know it well and have known it since I was a child. It is agricultural land, and never has been used for any other but agricultural and dairy purposes. It is situated in the 21st ward of Pittsburgh, on the extreme eastern boundary of the city. Mr. Kelly has never appropriated any part of that land to city purposes. He has never laid

any of it out in lots, that I have heard of, and if he had done so I would have heard of it. Whether the city has ever made surveys for streets through it I do not know of my own knowledge, but no streets have ever been opened through it by the city to my knowledge. The city has not to my knowledge extended any municipal improvements to this land. The district road commissioner may have done a little about filling ruts or something of the kind. I believe I did see him doing so, a few days ago, but it amounted to only very little. It was not an extensive process at all.

What is called the Frankstown avenue is the old Frankstown road. It passes through Mr. Kelly's land. Since that land was brought into the city there has not been as much done on that road as was done on it in the same length of time before it was brought into the city. I was along it on the 11th inst., and I never before saw it in as bad condition as it was on that day. I know what is called Homewood avenue. It is an old township; the city has made no improvements on it that I can see.

Mr. Kelly's land is about a mile and a quarter from the junction of Penn avenue and Frankstown avenue. At the junction of these two avenues and from that eastwardly along Frankstown avenue
62 for about half a mile it partakes of the character of city property. It has the gas, water, and pavements, but is not densely built up by any means. From there to the Kelly land there is nothing but farm lands, with the exception of two or three small plots of lots laid out. In the main it is agricultural land, and some of it is unproductive. I am speaking of the land west of the Kelly land.

I am acquainted with the lands north of Mr. Kelly's, between it and the Allegheny River. They are all nominally agricultural lands, but very much broken. The distance from Mr. Kelly's land to the Allegheny River is about a mile and a half; it is that at least. The character of the country north and west of Mr. Kelly's land is hills and hollows, with some agricultural land. Very little of it east of Negley's Run has been laid out in lots.

The land south of Mr. Kelly's is occupied in large parcels, such as ten or twelve acre lots; that is, down to the railroad. I would call it suburban property. The city has not extended the water accommodations to the Kelly land, nor means of protection against fire; and that land enjoys no protection by the police. There is no difference between the condition of that property, as to its use and occupancy since it came into the city, and its condition before it was brought in. It has certainly not been enhanced in value by having been brought into the city, but the reverse. That property is greatly depreciated by its having been brought into the city. The improvements on that property
63 are old fashioned and not valuable.

GEORGE FINLEY.

EDWIN O. ANDERSON, called by plaintiff and sworn, says:

I live near this land of Mr. Kelly and know it well. I have been living there nearly all my life. My mother owns land within about a quarter of a mile of Mr. Kelly's; about north or slightly northwest of it. She has nearly sixty acres; she applies her land to farming purposes. Her place, the 60 acres, was rented some years ago for $400 a year. That was up to April a year ago. It was rented for dairy purposes. We paid all the taxes. Since April a year ago we have had the place in our own hands. I am personally acquainted with Mr. Kelly's land; the land that Mr. Clark lives on. I would suppose that my mother's

land is worth as much for dairy purposes as Mr. Kelly's, except that it is a little further off. The land between my mother's and Mr. Kelly's is all agricultural. The land north and west of my mother's and Mr. Kelly's is rough and broken—hills and hollows. There is an ice pond between Mr. Kelly's land and the built up portion of the city. I have not seen that there have been any benefits conferred on my mother's or Mr. Kelly's land, since they were taken into the city, except the running of one street, which might, perhaps, be considered a benefit. Lincoln avenue is the street I mean, but it does not touch on Mr. Kelly's land or on us. Our lands do not run down to the river. If you run a line down to the river from our land and Mr. Kelly's there is a large extent of property between that and the built up portion of the city,
64 which is used altogether for agricultural purposes, but if you stop at Mr. Kelly's line and our line there would not be so much.

EDWIN O. ANDERSON.

JACOB HARTMAN sworn on part of plaintiff:

I reside in the 21st ward, city of Pittsburgh. I know the property of Mr. Kelly in that ward. It is used for dairy purposes. I am acquainted with the property adjoining and surrounding Mr. Kelly's land. It is all used for dairy or farming purposes. Taking the land all through I think $10 an acre per annum would be a big rent for the land there. I am paying less than that for my place. I rent the Shoenberger place, containing 115 acres, for $500 a year; they pay the taxes themselves. That farm runs clean down to the Allegheny River. It could not be used for any other purpose that I know of, so as to make more money out of it. It is beyond what is needed for building purposes. It is two miles beyond East Liberty, and such land is not needed for building purposes.

The city of Pittsburgh has not extended any paved streets, water, or gas out to this property. Lincoln ave. is to the right of the Shoenberger land about half a mile and to the left of Mr. Kelly's land about a quarter of a mile. I own land there. It is about near a half a mile from Mr. Kelly's land. It does not adjoin the Shoenberger land. The 59 acre tract does not adjoin the Shoenberger tract that I have already spoken of. My city taxes on this 59 acre tract for last year was near $500. I could not give the exact figures. In the boundaries of the 21st ward, between the Allegheny River, Negley's Run, the
65 Pennsylvania Railroad, and the eastern boundary line of the city, there is about 1,500 acres of land used for agricultural purposes, not wanted or used for city purposes. I cannot state the amount correctly.

JACOB HARTMAN.

THOMAS MELLON sworn on part of plaintiff.

I am acquainted with Homewood Station or Village; twenty acres was laid out into lots, by my sons, at Homewood Station; it is a little town by itself pretty much; it is bounded on two sides by Mr. Kelly's farm; on the other side by what we usually call country residences, ranging from five to sixteen acres each in quantity; the city of Pittsburgh has not connected this place with the built-up portions of the city by paved streets; it has not extended gas or water to it; the buildings are cheap frame buildings mostly; the nearest gas and city water to this place is Penn avenue.

THOMAS MELLON.

ABRAHAM L. RICH, called by plaintiff and sworn, says:

I live in East Liberty; I know the 80 acres of land of Jas. Kelly; I own about 10 acres adjoining it, and lying between it and the Pennsylvania Railroad; I also own a piece south of the railroad and extending to Pennsylvania avenue.

To the best of my knowledge these lands have not been benefitted in any way by being brought into the city; those lands of Mr. Kelly, in my judgment, are not any more valuable now than they would have been if they had not been taken into the city; the city improvements on the Frankstown and Pennsylvania avenues do not extend to
66 Mr. Kelly's land; from what I know of the steepness of Mr. Kelly's ground where Spencer avenue passes it, I think that avenue would be of no use to it; I do not think they could get up to it from Mr. Kelly's ground; the hill-side is so steep; that is my judgment; I know Mr. Kelly's land is used for farming and grazing purposes, and has been so used for ten or twelve years; I have known this land for thirty years, and have never known it to be used for any other purpose.

The Frankstown avenue and Homewood avenue are the old public roads; those public roads, I think, are sufficient for the uses of that farm without being called avenues; I know of no change having been made in those roads out by the Kelly land since that land was brought into the city; Frankstown road, I think, is worse now than it was before it was brought into the city; I mean the part in Mr. Kelly's land and from that on to the end of the pavement.

I am acquainted with the rental value of those lands to some extent; I have understood that Mr. Kelly's land rents for $700 to 800 per year; ten dollars an acre is about the highest that such lands rent for out there; I have ten acres adjoining Mr. Kelly's land and lying between it and the Pennsylvania Railroad, and had nineteen acres there, and I have not been able to rent it for as much as eight dollars an acre, on the average, for the last ten years; I know of no better use those lands could be put to than that they have been put to, or by which
67 more money could be made out of them; I do not know of any use those lands could be put to make the taxes out of them, and what is true of Mr. Kelly's land is true of all the farm lands in the 21st ward.

There is a large quantity of land between Mr. Kelly's and the built-up part of the city that is not used for city purposes; Mr. Kelly has not devoted this land to city purposes by laying it out into lots and offering it for sale; the city does not need streets through Mr. Kelly's land for city purposes, and has not opened any through it.

ABRAHAM L. RICH.

A. M. KING, called and sworn on part of pl'ffs, says:

I am a draughtsman by profession; I am 26 years of age; I prepared this plan; I prepared it from an atlas that contains a plan of the 21st ward; this atlas is in book form; it is taken from G. M. Hopkins & Co.'s map of that ward, and as contained in their book, only this map is enlarged four times; the scale of Hopkins & Co. is 1,000 feet to the inch, and of mine 250 feet to the inch. I made no surveys on the ground myself; this map contains all the roadways on Hopkins & Co.'s map; I do not know of my own knowledge whether there is any other roads or not, not having been on the ground; the map of Hopkins and Co. shows certain streets upon the land of Mr. Kelly that are not shown on this map; I know the streets shown on Hopkins & Co.'s map as running through Mr. Kelly's land are not open.

A. M. KING.

Plaintiff's counsel offers in evidence plan, which is marked Ex. A, May 24th, 1875, T. Mac C., being the same as spoken of by Mr. King in his testimony, and as having been made by him.

68 JOHN F. MCCOMBS recalled by plaintiff.

Paper shown witness who says:

This is a receipt, dated December 3rd, 1874, for $2,432.68 in full of all city taxes on this tract of land of Mr. Kelly's, in the 21st ward, Pittsburgh, for the year 1874. It is signed I. L. Stokely, constable; I saw Mr. Stokely sign it; I saw Mr. Kelly pay him the money; I signed it as a witness; Wm. J. Clark and James Lamont also signed it as witnesses, in my presence; Stokely had a warrant for the taxes; he had made a levy on all the property of Clark, the tenant, and was going to sell it; Mr. Kelly, to relieve the property of his tenant from levy and sale, paid the taxes under protest.

JOHN F. MCCOMBS.

Receipt offered in evidence by plaintiff's counsel and marked Exhibit B, May 24th, 1875. T. Mac. C.

THOMAS D. PATTERSON called and sworn on part of plaintiff.

I am chief clerk in the office of the treasurer of Allegheny County; I occupied the same position in 1874; I know Samuel J. Fleming; he was clerk in the county treasurer's office in June, 1874.

(Receipt shown witness dated June 30th, 1874, signed S. J. Fleming, for county treasurer.)

I am acquainted with the handwriting of S. J. Fleming; have seen him write frequently; this is a receipt of the county treasurer, signed by S. J. Fleming, one of his clerks, for county taxes for property of James Kelly in the 21st ward, Pittsburgh, amounting to $420.47—the net amount—and being for taxes for the year 1874.

THOS. D. PATTERSON.

Plaintiff's counsel offers in evidence above mentioned receipt marked Exhibit C, May 24th, 1875. T. Mac. C.

69 WM. J. CLARK, recalled by plaintiff, says:

I have been living on this land of the plaintiff since 1859. I was present when Mr. Kelly paid the city taxes to the constable on the 3rd of December, 1874. The money was paid in my house, on Mr. Kelly's land. I signed the receipt as a witness, as did also Jno. F. McCombs and James Lamont, who were present when the money was paid.

(Exhibit B shown witness.)

This is the receipt. It was signed by J. L. Stokely, the constable, in my presence, and the presence of J. F. McCombs and James Lamont, and the money was paid in our presence.

The constable had a warrant for the taxes; had levied on my property; had advertised it for sale on the 3rd of December, 1874, and had come to sell it. Mr. Kelly then paid the money to save my property from being sold, but he paid it under protest. The constable put up an advertisement of the sale on one of the buildings on Mr. Kelly's land—a little building on the roadside near my house. I had to give bail to the constable in double the amount of the taxes; I think in the neighborhood of $6,000.00, for the forthcoming of the property on the day of sale.

This is the constable's advertisement that I have spoken of. (This

adverti sement marked Ex. D, T. MacC., May 27th, 1875, in evidence.) The property levied on by the constable was worth over $4,000.00.

The city has not increased our public school facilities in that part of the ward. The nearest public school to me in the ward, is the
70 one in the big brick school-house on the point at the connection of Frankstown and Lincoln avenues. As nearly as I can judge, that school-house is about a mile and a quarter from my house. There is another public school house over towards the Allegheny, which by the road is nearly two miles from me. There is a school-house in the 22d ward that is about a mile from my house. I understand there is some arrangement by which children from the 21st ward may go to it.

WM. J. CLARK.

JOHN M. MURTLAND, called by plaintiff and sworn, says:

I have lived in the 21st ward, since May, 1865. John Grazier and I had 25 acres of ground at Dallas Station, between Homewood and Torrence Stations. We sold some of it off and then divided the remainder. I own now about 8 acres there. I also own about three acres and a half where I live at Homewood Station.

There is not now any general demand for lots in that neighborhood. Between my ground at Dallas Station and the built-up part of the city there is a large amount of ground unoccupied and for sale, but for which there is no market. The prospect for its occupancy is very remote, from present appearances. If Mr. Kelly should lay off his eighty acres in lots and offer them for sale, I am satisfied that he could not get purchasers for them. I am well acquainted with the demand for such property.

71 Mr. Kelly's place does not receive any additional protection from being in the city. It does not need any municipal protection. That is my opinion. I think that at the present time Mr. Kelly's land would sell for more if it lay immediately outside of the city than it would as it is, inside of the city. I do not think it is any more available for city purposes than it would have been if it was outside of the city. I am not aware that the city expends any money on this property, or that it receives any benefit from municipal expenditures of her revenues.

I am acquainted with the village of Homewood and the Mellon lots. The buildings on the Mellon lots are cheap and inexpensive; nearly all frame, and generally small. The little village at Mellon's lots is a detached one, and has neither gas, water, nor pavements. Our taxes are very much higher now than they were before we were brought into the city; I think they are ten times higher. I do not think McKelly could put that property to any use whereby he could make the city taxes out of it.

JOHN M. MURTLAND.

HUGH NEAL called by plaintiff and sworn, says:

I am a surveyor and civil engineer. I am acquainted with the standard of measurement used by the city of Pittsburgh in laying off the streets in the lately annexed part of the city, and on the ground of Mr. Kelly. I have been on this ground of Mr. Kelly several times.

I have examined the surveys made by the city for streets on
72 this ground of Mr. Kelly. There is a difference between the standard of measurement used by the city in making these measurements, and the standard measure of the United States. This

so-called city standard has its unit of measure of a greater size or dimension than that of the United States standard. That is, each so-called foot in this city standard measure is somewhat greater than an actual or true foot measure of the United States standard. One hundred feet of city standard measure are equal to one hundred feet, one inch, and very nearly three-eighths of an inch of United States standard measure. In every space of eight hundred and seventy feet measure by the city standard, there are really eight hundred and seventy-one feet measure by the United States standard. The difference between the two standards in a mile (5280 ft.) is six feet and a little less than one inch. That is a mile measured by the city standard would *me* a mile, six feet, and a little less than one inch measured by the United States standard.

HUGH NEAL.

JAMES B. MEREDITH, called by the plaintiff and sworn, says:

I am a surveyor and civil engineer. I am acquainted with the standard of measure used by the city of Pittsburgh. I worked with it six or seven years in the employ of the city.

I was present when Mr. Neal, the last witness, was giving his testimony and heard his statements. His statements in regard to
73 there being a difference between the standard of measure used by the city, and that of the United States, and the amount or extent of the difference between the two standards are correct in every particular.

JAMES B. MEREDITH.

Plaintiff's testimony closed.

DEFENDANT'S TESTIMONY.

Mr. Bigelow offers in evidence act of assembly, approved April 15th, 1868, entitled An act; also act of assembly approved June 11th, 1840; entitled An Act to create additional revenue, &c.; also, act of assembly, approved May 3rd, 1841, entitled.

(Mr. Sutton objects to these acts of assembly as incompetent and irrelavant.)

ALEXANDER DEMPSTER, called and sworn on part of defendant, says:

I am city engineer of the city of Pittsburgh. I know the property of James Kelly in the 21st ward. The territory included in the 21st ward is a part of that consolidated under the act of 1867. Streets have been located in that ward, authorized by councils, since the consolidation. Some of these streets pass through the property of James Kelly. I think they were located in the summer of 1870. I know of the grading and paving of Penn. Avenue, and of the existence of gas and water along its entire length. That avenue extends to the city line, and that line passes through the property of James Kelly. But Penn. Avenue does not touch his property. There have been quite a number of streets,
and avenues located leading from Penn. Avenue to James Kelly's
74 land. Homewood Avenue is used for the purpose of travel from Penn. Avenue to Frankstown Avenue, which goes to the property of James Kelly. Homewood Avenue was formerly a country road, but it has been ordered to be opened, widened and improved. I know the location of Spencer Avenue. A portion of it runs along the line of James Kelly's land. That avenue has been opened and graded. It

connects with Lincoln Avenue. Lincoln Avenue is being graded and paved with improved pavement. Spencer Avenue is not paved; it is only graded. The property of Mr. Kelly abutting on Spencer Avenue can find access to the centre of the city along that avenue, and by way of Lincoln Avenue.

Mr. Kelly's property is but a short distance from Penn. Avenue, and the paved part of Frankstown Avenue.

Question. Does not Mr. Kelly's property receive all the benefits of the city government so far as he will permit it to receive the same?

Answer. According to the act of assembly the majority of frontage controls street improvements in that portion of the city, and Mr. Kelly owning a large frontage on streets unopened could have said streets opened and improved if he so desired, and make connection with streets already improved. If the streets were opened through his property it would be possible to extend the water main to his property, so that he might have the immediate use of the water.

75 I know that property adjoining Mr. Kelly's has been sold since consolidation, and laid off, and sold in lots; quite a number have been sold. Grazier and Murtland, Daniel McGurk, and the East Liberty Improvement Co. bought since consolidation; Thomas Mellon bought some from Grazier & Murtland since consolidation. Many of these town lots that have been sold have been built upon. In 1870 Mr. Kelly desired to have the streets extended through to the base of the hill.

Question. Has not property in the rural districts, in the locality of Mr. Kelly's property, largely increased in value by the consolidation which brought in Mr. Kelly's property, since the date of consolidation?

(Objected to by Mr. Sutton, because it relates to rural property generally, and does not apply to the property in question, or show that it has been benefitted in any manner whatever.)

Answer. Yes; I think so.

Cross-examined by Mr. SUTTON:

When I say that streets have been located through Mr. Kelly's property, I mean merely that they have been surveyed, and marks placed at the intersections of the streets.

Question. Has there been a single city improvement made on Mr. Kelly's land of any kind since the consolidation?

Answer None, except on Spencer Avenue. Homewood Ave. is now under way.

Question. Has there been a single street or avenue graded, paved or improved from Penn. Avenue to Mr. Kelly's land?

76 Answer. No, sir; except Homewood Avenue which has been ordered to be improved. A portion of Homewood Avenue is the old township road. It then diverges from that road, but it has not yet been opened. When I speak of lots laid off along or near the land of Mr. Kelly, I mean plans actually adjoining or contiguous to Mr. Kelly's property. There was the McGurk plan—I do not know the size of the tract he laid off. There are buildings erected and streets opened on those plans of lots.

The location of the streets was made in 1870. Penn avenue does not touch the land of Mr. Kelly within the city limits. Homewood avenue is the communication between Penn and Frankstown avenues. It is now used as it was before consolidation. Frankstown avenue is the most convenient way of conveyance from Mr. Kelly's land to the city. Penn avenue is not so near. These old roads are amply sufficient for

Mr. Kelly's lands used as farm-lands. Mr. Kelly's lands are used now as they were before consolidation. The improved part of Spencer avenue stops at Wilson's line, I think, near Mr. Spencer's residence. The point where Spencer avenue stops at Wilson's line is about a half a mile from Lincoln avenue. No portion of Spencer avenue has been paved. Lincoln avenue is paved from Frankstown avenue to the bridge, and is being paved beyond the bridge. The bridge is about a half mile from Mr. Kelly's land, going around by the road—I mean that from Mr. Kelly's west line, round by Spencer and Lincoln avenues, it is
77 about half a mile to the bridge. Lincoln avenue does not touch Mr. Kelly's land anywhere, I think. Lincoln and Spencer avenues would not afford Mr. Kelly as near a way to the city as Frankstown avenue. I mean from the buildings on the land.

When I say Mr. Kelly's land receives the benefit of the city government, I mean so far as our department is concerned. Ours is the engineer's department. When I say that Mr. Kelly desired to have the streets extended through to the base of the hill, I meant that he desired to have them surveyed to that extent. I think that the improving of Penn avenue improved all the lands within that vicinity, more particularly within the city limits.

ALEXANDER DEMPSTER.

Defendant's testimony closed.

Copy Exhibit B.

Received, Pittsburgh, Dec. 3rd, A. D. 1874, of James Kelly, the sum of twenty-four hundred thirty-two & $\frac{68}{100}$ ($2,432.68) doll's in full of all city taxes, as per assessment of the year one thousand eight hundred and seventy-four, assessed and charged by said city on eighty (80) acres of his land, situate and lying in the 21st ward of said city, being the identical tax which the said Kelly is now contesting the right of the city to collect at No. 941, September term, A. D. 1874, and for the payment whereof I, as city collector, have heretofore seized and now hold in my legal possession, as such collector, certain personal property found on said premises, and which I have advertised for sale at public auction for the non-payment of the taxes aforesaid; but which is
78 now released from said seizure by the payment of the aforesaid taxes, and which the said Kelly pays under protest. Received the above in full.

I. L. STOKELY,
Constable.

Witness:
JNO. F. MCCOMBS.
W. J. CLARK.
JAS. LAMONT.

Copy Exhibit C.

No. 417.

County,	476 07
State,	
Total,	476 07
10 per ct.,	47 60
Am't paid,	$428 47

Received, June 30th, 1870, of James Kelly, esq. (paid under protest), 21st ward, Pittsburgh, taxes for 1875 as per margin.

S. J. FLEMING,
For County Treasurer.

Copy Exhibit D.

COLLECTOR'S SALE.

By virtue of a collector's warrant, the following property will be exposed at public sale to the highest and best bidder, on the premises of J. W. Clark and Jas. Lamont, near Homewood, 21st ward, city of Pittsburgh, on Thursday, 10 o'clock a. m., the 3rd day of December, 1874, to wit: 26 cows, 3 fat hogs, 2 lots of hay, 1 hay-cutter with horse power, 8 forks, 1 hand cider press, 5 head of horses, 1 corn sheller, 1 root cutter, 3 lots oats, 2 sets buggy harness, 5 sets fly nets, 2 saddles, 2 sets single harness, 1 double set lead harness, 2 double sets harness, 1 buck wagon, 2 road wagons, 2 horse spring wagon, 2 grain drills, 1 wind-mill, 3 plows, 1 harrow, 2 cultivators, 6 shoats, 1 lot oil meal, beans and shorts, 1 lot of corn, 1 hay-stack, 1 lot straw, 1 sled, 1 wagon and hay
79 ladder, 1 horse hay rake, 1 lot corn & fodder in fields, 2 horse wagon, 1 horse wagon, 1 cultivator, 2 plows, 3 cows, 2 horses, 1 set double harness, 1 single, 2 lots corn in shock, 1 lot potatoes, 31 hot bed sash, 2 lots celery, 5 lots cabbage, 1 lot beets, turnips and radishes.

Seized and taken in execution as the property of J. W. Clark and Jas. Lamont vs. James Kelly.

I. L. STOKELY,
Constable.

(Endorsed:) No. 941. Sept. T., 1874. James Kelly vs. The City of Pittsburgh. Testimony and exhibits by T. MacConnell, master. Filed Sept. 4th, 1875.

80 No. 941. Sept. term, 1874.

JAMES KELLY
vs.
THE CITY OF PITTSBURGH.

And now, to wit, July 3rd, 1876, James Kelly, complainant in this cause, being aggrieved by the decree of the honorable court in this case, by his counsel appeals therefrom to the supreme court of the commonwealth of Penn'a.

JAMES KELLY,
By W. H. & A. N. SUTTON,
His Att'ys.

ALLEGHENY COUNTY, *ss:*

James Kelly, the above named complainant, being duly sworn according to law, deposes and says this appeal is not intended for the purpose of delay.

JAMES KELLY.

Sworn & subscribed before me July 3d, 1876.

B. F. KENNEDY, *Pro.*

(Endorsed:) No. 941. Sept. T., 1874. James Kelly vs. The City of Pittsburgh. Appeal and affiavit. W. H. & A. N. Sutton.

81 WESTERN DISTRICT OF PENNSYLVANIA, *sct:*

The commonwealth of Pennsylvania to the judges of the common pleas court No. one of Allegheny County for the county of Allegheny, greeting:

We being willing for certain causes to be certified of a certain plea or plaint levied in our court before you sitting in equity at No. 941, Sept. term, 1874, from your order or decree, in which James Kelly was complainant and the city of Pittsburgh, defendant, do command you that the record of the plea or plaint aforesaid, the order or decree therein, and all proceedings had thereon, together with all things relating thereto, by whatsoever names the parties may be called, you certify and send, together with this writ, before the judges of our supreme court of judicature, at Pittsburgh, at our said court, there to be held for the western district of Pennsylvania, on the first Monday of October next, that same being inspected, we may further cause to be done therein what of right and according to our customs ought to be done.

Witness the honorable Daniel Agnew, LL. D., chief justice of our said supreme court, at Pittsburgh, the 3rd day of July, in the year of our Lord one thousand eight hundred and seventy-six, and of the commonwealth the

I. B. SWEITZER,
Prothonotary of Western District.

COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

To the honorable the judges of the supreme court:

The record and process within mentioned, with all things touching the same, before the judges within named at the day and place within contained in a certain record to this writ annexed, we do certify and send as within we are commanded.

EDWIN H. STOWE. [SEAL.]

(Indorsed:) No. 172 of Oct. and Nov. term, 187 . Supreme court. James Kelly, pl't'f in E., vs. The City of Pittsburgh.

Certiorari to the com. pleas No. 1 of Allegheny Co., at No. 941 of Sept. T., 1876, returnable to first Monday of Oct., 1876.

Precipe, affidavit, and recognizance filed and writ issued July 3d, 1876.

Rule to appear and plead at return of writ.

N. B.—20 days' notice to the party or its counsel below is necessary to compel an appearance.

I. B. SWEITZER,
Pro. W. D.

Service accepted.
July 3d, 1876.

T. J. BIGELOW,
Att'y for D'f'd't.

W. H. & A. N. SUTTON,
Att'y for

82 In the supreme court of Pennsylvania, western district, No. 172 of Oct. and Nov. term, 1876.

JAMES KELLY
vs.
THE CITY OF PITTSBURGH.

Isssue writ of certiorari to the common pleas court of Allegheny County, at No. 941 of Sept. term, 1874, returnable to next term.

W. H. & A. N. SUTTON,
Attorney for Plaintiff in Error.

To J. B. SWEITZER,
Pro. S. C., W. D.

JULY 3RD, 1876.

COMMONWEALTH OF PENNSYLVANIA, *ss:*

James Kelly, plaintiff in error, being duly sworn according to law, on oath saith that the said appeal is not intended for delay.

JAMES KELLY.

Sworn and subscribed the 3rd day of July, 1876, before me.

J. B. SWEITZER,
Pro. S. C., W. D.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

You, James Kelly, William Stevenson, & Wm. B. Hunter, severally acknowledge to owe the Commonwealth of Pennsylvania one thousand ($1,000.00) dollars, upon the condition that the s'd James Kelly prosecute this writ of certiorari with effect; and if judgement be affirmed, that he satisfy and pay the debt, damages and costs recovered, together with such costs as shall be awarded by occasion of delay of execution, or else you will do it for

JAMES KELLY.
WM. STEVENSON.
WM. B. HUNTER.

Taken and acknowledged the 3rd day of July, 1876, before me.

J. B. SWEITZER,
Pro. S. C., W. D.

(Indorsed:) No. 172. Oct. and Nov. term, 18 , supreme court. James Kelly, plaintiff in error, pl't'ff below, vs. The City of Pittsburgh. Cert. to the com. pleas. No. one of Allegheny County, at No. 941 of Sept. term, 1876. Prec. and affi't and recog., filed and writ issued July 3d, 1876. Rule, &c. 6$ app'l't p'd. W. H. & A. N. Sutton, att'y for plaintiff in error.

83 *Assignment of errors.*

In the supreme court of Pennsylvania, western district, No. 172 of Oct. & Nov. term, 1876.

JAMES KELLY, APPELLANT, COMPLAINANT BELOW,
vs.
THE CITY OF PITTSBURGH, APPELLEE.

First. The court erred in dismissing the exceptions to the master's

report. They should have been sustained, said exceptions being as follows:

Complainant excepts to the report of Thos. MacConnell, esq., as master in this cause, and showeth:

First. Complainant excepts to the master's report of facts, as wanting in the certainty justifiable by the direct allegations of the bill and the weight and character of the evidence, defendant having introduced no evidence controverting any of complainant's material allegations, or in support of the issue raised by the answer. The master should have found, directly and positively, that all the material allegations of complainant's bill were sustained.

Second. Complainant, under the facts as set forth in his bill, and the evidence thereon, denies the right of the city of Pittsburgh to subject the land in question to taxation for municipal purpose, claiming that such exercise of the taxing power by the city of Pittsburgh is in violation of section 10, of article 1, of the constitution of the Commonwealth. The constitutionality of the entire tax as levied for municipal purposes, and not errors of assessment or irregularities of burden arising therefrom, constitutes the issue, and the master, in his report of his conclusions of law, should have confined himself to the material issue.

84 Complainant therefore excepts to all that portion of the master's report relating to the law regulating assessments, and authorities cited thereon, as also to all that portion of said report relating to the authorities cited on inequalities of taxation, as not bearing upon the issue, and being irrelevant matter, tending to encumber the record and embarrass the real issue, should therefore be stricken from the record.

Third. The master finding from the evidence the fact that the city does not extend to this property the considerations which the supreme court of Pennsylvania have held to be the essential requisites to justify the exercise of the taxing power for either general or local purposes, the master should have found as a legal consequence that complainant's farm was not liable to taxation for municipal purposes, and therefore entitled to relief from the following taxes as stated in the city's statement of assessments, as set out in the master's report, to wit:

City tax, 4 mills	$876 40
City building, ¼ mill	54 90
Fire, 1 mill	219 60
W. W. int. & S. F., 1½ mills	329 40
City schools	634 76

Fourth. The master finding complainant's farm lands unchanged by and receiving no benefits from consolidation, the master should have found that said farm lands were subject to taxation for only such purposes as the same were subject to previous to consolidation, or that similar property is subject to without the city boundaries, and that by the act of consolidation the municipal authorities became and

85 were ex-officio authorized to collect and disburse the same.

Fifth. The issue raised by complainant's bill, resting upon a provision of the constitution of Pennsylvania identical with the provision in the constitution of the State of Kentucky, and the supreme court of Pennsylvania having adopted the construction put upon this provision by the supreme court of Kentucky, the complainant therefore excepts to the conclusion arrived at by the master, "that the law is different in Pennsylvania," as being unsustained by either evidence or authority.

Sixth. Complainant excepts to the quotation made by the master of the rule adopted by the supreme court of Iowa in the case of Mitchell

vs. Davenport, 34 Iowa, 192, as setting forth but a portion of said rule, and the portion so quoted by the master is not applicable to the facts as set forth in complainant's bill and the evidence adduced before the master.

Seventh. Complainant excepts to the entire theory, understanding, and treatment of the material issue, as set forth by the master in his report, and he likewise excepts to the finding and the decree in toto as rendered by the master.

Second. The court erred in dismissing complainant's bill, and the said decree is assigned as error.

W. H. & A. N. SUTTON,
Att'ys for App'l't.

(Endorsed:) No. 172. Oct. & Nov. T., 1876. James Kelly, appellant, vs. The City of Pittsburgh, ap'lee. Assignments of error. Filed Sept. 2d, 1876. W. H. &. A. N. Sutton.

86 No. 172. Oct. and Nov. term, 1876.

JAMES KELLY
vs.
THE CITY OF PITTSBURGH.

Appeal from the decree of the court of common pleas, No. 1, of Allegheny County. Argued Oct. 4th, 1877.

The lands of James Kelly, the appellant, upon which the taxes complained of were assessed, were formerly within the township of Collins, and were afterwards, under the provisions of the act of April 6th, 1867 (P. L., p. 486), made part of the city of Pittsburgh. That there may be no doubt concerning the subject-matter of the plaintiff's complaint, and that we may exhibit precisely the nature and character of his contention, we give the 6th paragraph of his bill in extenso:

"It is competent for the legislature, with or without the consent of the citizens, to enlarge the limits of any town or city, and it is competent for the defendant (city), when the requirements of population, commercial and mechanical interests, sanitary or protective municipal purposes require it, to apply to city uses the full extent of her territorial limits, but your orator expressly denies that such necessity or even propriety exists; on the contrary, large amounts of city territory on either side and front of your orator's farm are occupied, held and owned without prospects of demand for city purposes for many years to come. Your orators insists, that by extension of city territorial limits, the character, situation, and use of his said lands were not changed, but remained an improved and occupied farm as before, and agricultural lands only; having received no benefit whatever in the way of municipal improvement, aid, protection, convenience, or care; and that, therefore, they are not in any sense liable to municipal or city taxation for any purpose whatever, for no single benefit has been received." Again, paragraph 17, latter part, "But your orator expressly denies that the defendant had any municipal jurisdiction over his said land or farm, or any right to impose taxes thereon for city or municipal purposes whatever."

87

We are thus presented with the broad question of the right of the city to tax rural lands within its bounds for any municipal purpose whatever. It is not admitted that the city succeeded to the rights of the township in this respect, for this would be a surrender of the whole

controversy, since it is not doubtful that the township had the power to tax these lands for every lawful municipal purpose whatever.

The power of the legislature to transfer the plaintiff's farm from the one municipality to the other is admitted; indeed that power could not, in the face of Smith vs. McCarthy (6 P. F. S., 359), be gainsaid. But it is urged, nevertheless, that the city's power of taxation must be suspended until this land becomes necessary for city purposes. Exactly what this means we are not informed, nor do we suppose it can be certainly known, except from some judicial decree not yet recorded. No doubt the meaning of the plaintiff is that this power of the city is to be suspended or to rest in abeyance until the city is so nearly built up to his lands that they may be advantageously laid out and sold as city lots, and until this occurs they are to be exempt from all taxes of a municipal character. This proposition is novel in Pennsylvania,
88 since we have uniformly and heretofore without serious complaint, in boroughs as well as cities, taxed rural and even unseated lands for borough and city purposes. This doctrine is however supported by certain cases cited by the learned counsel for the appellant, decided in the superior courts of Kentucky and Iowa. The bill seems closely to have followed these cases, and it is principally upon their authority that the plaintiff's case is rested. These decisions, whilst entitled to great respect, are not to be allowed to unsettle our own rules on the subject of taxation, or change the current of our policy on this subject. They are indeed of doubtful authority, for Judge Cooley, in his work on taxation, when speaking of these very cases, remarks that it is difficult to harmonize them with the conceeled principles governing the laws of taxation; for they, not questioning the legislation as being in excess of authority, leave it to stand and only interfere to qualify its effect on the ground that it has been adopted on improper grounds and will operate unequally. This is done on an inquiry into the facts and as substitution of the judicial for the legislative conclusion on a subject not at all judicial; a subject, too—the proper limits of city extension—upon which persons are certain to differ widely, and when inquiry after the judicial method by examination of witnesses is usually much less satisfactory than that personal knowledge and investigation which legislators are supposed to possess or make. It has indeed the effect to suspend the legislation until certain conditions influencing the judicial mind are fulfilled. We need not stop to consider the inconvenience or uncertainty of such a condition of things, or how little consonant it would
89 be with our settled modes of thought and action on subjects of this kind. There is, how'er, an element in the case in hand which either did not exist in the cases alluded to or was not sufficiently considered; that is, the subjugation of the lands to previous municipal taxes. The argument in favor of their exemption would have more strength had they previously to their attachment to the city been subject only to State and county rates and levies; had they not been within the dominion of any municipality equivalent to that now complained of. But the plaintiff's property was subject to municipal taxes when it was yet in the township of Collins, hence it is not subjected to any new or even greater powers than formerly; it has been but transferred from township to city. This element breaks the force of the plaintiff's argument, as it leaves him nothing of which to complain, for his complaint is not that his municipal burthens are greater in the city than they were in his township, but that as his lands are now situated the city has no power to tax them in any manner whatever. This is the bold proposition submitted for our discussion, a proposition requiring

little consideration for its disposition, since there is here no room for the intervention of judicial interference, or for the exercise of judicial discretion. The legislature certainly did not exceed its powers in the act consolidating the two municipalities, and as both had the power of taxation over their several territories, that power must remain with the present corporation, and the plaintiff's lands must continue liable for those rates and levies to which it was subject under the township government, otherwise they are exempt from those impositions for the maintenance of the public schools, the support of the poor, and
90 construction and repair of the highways, from which no one's property ought to be exempt.

On the broad ground, therefore, on which the plaintiff has put his plaint, it cannot be maintained, and must be dismissed. Considering it, however, from the less general and most favorable point of view, and it but comes to this, that the taxation is unequal and burthensome, and that the complainant is taxed for some things, as police and water, from which, however necessary for the welfare of the municipality, he derives no benefit. Granted that the tax is both unjust and unequal, it does not follow that the remedy is within the power of the courts; on the other hand, the contrary has been expressly ruled. In the case of Weber v. Reinhard, 23 P. F. S., 370, Mr. Justice Sharswood says, in commenting on the case of the Philadelphia Association v. Wood, 3 Wr., 73: "The idea that the court could pronounce a tax unconstitutional on the mere ground of injustice or inequality was expressly repudiated." He further remarks: "There is no provision in the constitution that taxation shall be equal. Sound policy requires that it shall be so as far as possible, but perfect equality is not possible." So in Kirby v. Shaw, 7 Hav., 258, Gibson, C. J., says: "As regards taxation there is no limita-
91 tion of it. Equality of contribution is not enjoined in the bill of rights, and probably because it was known to be impracticable." That the person taxed derives no immediate personal benefit from the purpose to which the taxes are appropriated, is, in like manner, no argument against the constitutionality of the law imposing them. For if direct personal benefit were to form a criterion for taxation, we should have half the community clam*m*ering at our doors for relief. What interest, direct and personal, has the unseated land-owner in the schools or poor of the borough or township in which his lands lie? Or, for that matter, what interest has any one not having children to educate in the schools of either township, borough, or city? Why shall one pay road-tax when roads are of no benefit to himself or his property? Why shall he help pay the expenses of a fire department when his property is so situated that it may burn down before an engine can reach it? Or why, either in the country or city, having a supply of water on his own premises, shall he pay a water-tax? To these questions there is but one answer; these things are intended for the public good, and hence every one is indirectly if not directly benefited thereby; the taxes levied for their maint*ai*nance are a public burthen, and, therefore, every one
92 must contribute to its support. If, however, this burthen rests unfairly heavy upon some classes or upon some individuals, the remedy is not with the courts, but with the legislature. As is said in Kirby v. Shaw, the judiciary could interfere only "by overstepping the limits of its sphere; by arrogating to itself a power beyond its province; by producing intestine discord, and by setting an example which other organs of the government might not be slow to follow." But the legislature has granted all the relief that the plaintiff and his class ought, in reason, to expect or ask, for at the time of filing of this bill, rural

lands were authorized to be taxed at but two-thirds of the ordinary municipal rates, and now, by the act of May 5th, 1876, Ph. L., 124, at but one-half those rates. Thus the injustice and inequality of the taxation complained of has been, if not wholly obviated, at least very much mitigated.

Again taxation is peculiarly a legislative function, and before we undertake to revise it we should have a clear warrant therefor in the letter of the constitution. "A tax law must be considered valid unless it be for a purpose in which the community taxed has no palpable interest; when it is apparent that the burthen is imposed for the
93 benefit of others, and when it would be so pronounced at first blush." (Sharples v. The Mayor of Philadelphia, 9 Hav., Black, C. J.; Speer v. Blairsville, 14 Wr., 150, Agnew, J.) But in the present case there is no doubt that the community called the City of Pittsburgh, of which the plaintiff is a member, has a direct and vital interest in the taxation complained of, and such being the case there is an end of our power to grant relief. It will not do for us to stop to consider the peculiar interests of the individual as segregated from the community, for if we should do so few tax-laws could be enforced, since it often, if not generally, happens that such laws bear hardly upon some individuals, and not unfrequently individual interest is opposed to that of the public. We must have regard to the public welfare; if it be not shown to us that the legislation is for the promotion of the good of some other party or community than the one taxed we have no right to pronounce it unconstitutional. The individual must be regarded as interested in the public welfare, hence his interest must be looked for in that of the community of which he forms part.

Now, it may be true that the plaintiff is not personally benefitted
94 by either the educational or poor department of the city, but neither is any one not having children to educate, and not being himself a pauper. Yet, for such reasons, we are hardly prepared to stay the hand of the collector of school and poor rates. He may not be personally benefitted by the fire or police department, but the general municipality is largely benefitted thereby, and his welfare is found in the prosperity of that municipality. As was well said by the learned master to whom this case was referred, the value of the plaintiff's property has heretofore depended upon the growth and prosperity of the city, but these it turn depend upon the character of the city streets and police department, and upon its water, gas, and educational facilities. Without them it would fall into decay, and the value of real estate within the bounds of the municipality, including that of the complainant, would be incalculably reduced. It is thus apparent that the plaintiff has not only a general but a direct interest in the objects which the taxation complained of is intended to promote.

Decree affirmed.

Sterrett, J., dissents.

95 *Dissenting opinion by Agnew, C. J. Filed January 8th, 1878.*

The leading facts of this case raising an important question upon the power of taxation for city purposes, alleged in the bill, and either not denied in the answer as found by the master, are these: The limits of the city of Pittsburgh were extended to embrace a large tract of country composed of farm lands, including the rural townships of Pitt, Oakland, Collins, Liberty, and Peebles. The plaintiff owns a farm of eighty acres bounded by farms, excepting an adjacent parcel of about twenty

acres laid off into lots. On the north of his tract lie about one thousand acres in farms, and surrounding and between it and the city lie other farms. His tract is used for farming and dairy purposes only. It was not brought into the city with his consent, and has not been laid off into lots. It lies distant from gas-pipes and lamps, water-pipes, sewers, police beats, and fire apparatus. It has no streets or lanes maintained for city uses, except those prior-existing roads which were and are sufficient for the use of his farm. It has springs of water sufficient for its use. In consequence of being brought within the
96 city limits, it is taxed a sum of $2,117.00, on a valuation of $244,000, for city purposes alone, exclusive of county, poor, and ward school taxes, while the productive yearly value, as a farm, is ten dollars per acre, or $800 for the whole.

The master has discussed a number of immaterial questions, for example, the system of valuation and its conclusiveness; the power of the city to extend works into the tract, and the ability of Kelly to lay off his land into city lots. These, however, concern the future chiefly, and are aside from the true question, that of power, to wit, the authority of the city to burthen such property, in its existing condition, with taxes for merely city purposes. The rightful power of the city to do this is vested primarily on the power of the legislature to extend the city limits over farm lands. The power to extend is exceeded. It is often necessary as a wise preparation to bring such lands into a state necessary to adapt them to future progress. But this concession to the power of extension, and general municipal jurisdiction, gives no power to tax farms having no need of city improvements for exclusively city purposes. The
97 powers are essentially different. It might as well be argued that the extension by act of assembly of the limits of Pittsburgh to the boundaries of Allegheny County, or to that part lying between the rivers Monongahela and Allegheny, would confer a power upon the city to tax all the farms in the county, or that section of it between the rivers, for gas, water, police, fire, and other city uses. The difference is not in principle, but only in extent of surface. It is first as illegal to tax these farms in the several townships heretofore named, as to tax all the townships in that section between the rivers: the latter only exhibits the abuse more palpably. The owners of these farm lands, in the townships brought within the limits, have no common interest or benefit of the improvements in the built-up or true city.

If the legislature can, by a mere extension of boundary, authorize the city to tax farm lands for purely city purposes, it might, without extension, direct all farms within given lines, outside of the city, to pay these city taxes. Thus when we get rid of that concession of thought which compounds extension of boundary and power of taxation, we per-
98 ceive that taxes levied on mere farm lands to pay city levies, applicable only to the built-up or true city, is nothing more than an order to farmers to pay for benefit of the city residents. It is taking the money of A. to pay for improvements made for the use of B. This is palpably and flagrantly unjust, and therefore against common right. If the legislature itself cannot compel farmers to pay city taxes for purely local purposes, in which they have no share, it is clear it cannot authorize the city to do indirectly what it cannot do directly. An order, with or without the extension of boundary, upon a certain class to pay taxes for local benefits conferred on others is wholly different from a power to pay a general tax for the support of government. The latter is a power to which every citizen of a State submits himself in consideration of the general benefit derived from government. But as to

the former, it is well said in Bradshaw v. City of Omaha, 1 Nebraskee, 16, that the object is to make the owners of the farms divide the expense of supporting the municipal government with those who need it; that the true city is the built-up part, while the levy of taxes on farms is to confiscate property outside for the benefit of those within the true city. See also Taylor v. Porter, 4 Hall,
99 140; Holden v. James, 11 Chap., 396. The power of the legislature is clear to divide the State for convenient local government into counties, townships, cities, boroughs, &c., conferring on each an appropriate autonomy. But in doing this, the powers conferred must be adapted to the ends to be accomplished by each. A sound and large discretion is necessarily exercised in this adaptation of power. But it is equally clear that the powers conferred must have a reasonable appropriateness to the end proposed. Such an exercise of power only can fairly comport with the true and acknowledged principles of our American governments, which are all founded on the rights of the people, and for their "peace, safety, and happiness." (Sect. 2, Declaration of Rights, new constitution.) These principles are well stated by Justice Chase in Calder v. Bull, 3 Dallas, 386: "The people of the United States (he says) erected their constitutions or forms of government to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence.
The purposes for which men enter into society will determine the
100 nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it. The nature and ends of legislative power will limit the exercise of it." Again: "There are acts which the Federal or State legislature cannot do without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of the legislative power; as to authorize manifest injustice by positive law, or to take away that security for personal liberty or private property for the protection whereof the government was established."

The same thoughts were thrown out by Chief Justice Marshall, in Fletcher v. Peck, 6 Cranch, 87: "It may well be doubted (he says) whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? To the legislature all legislative power is granted, but the question whether the act of transferring the property of an individual to the public be in the nature
101 of the legislative power is well worthy of serious reflection."

This is precisely the question before us, whether under the mere name or color of taxation, the legislature can confer on a city a power to transfer the money or property of farmers outside of the true city to those who live in it, for purposes by which they alone are benefitted? The inviolability of the right of private property and the natural boundary of the legislative power has been enforced already in this State in the case of Washington avenue (19 P. F. Smith, p. 363), in these words: "When, therefore, the constitution declares, in the ninth article, that among the inherent and indefeasible rights of men is that of acquiring, possessing, and protecting property; that the people shall be secure in their possessions from unreasonable searches and seizures; that no one can be deprived of property unless by the judgment of his peers or the law of the land; that no man's property shall be taken or applied to public use without just compensation being made; that every man for

an injury to his lands or goods shall have remedy by due course of law, and right and justice administered without sole denial or delay;
102 and that no law impairing contracts shall be made; and when the people, to guard against transgressions of the high powers delegated by them, have declared that all these rights are excepted out of the general powers of government and shall forever remain inviolate, they for their own safety stamped upon the right of private property an inviolability which cannot be frittered away by verbal criticism on each separate clause, nor the united fagot broken stick by stick, until all its strength is gone. There is a clear implication from the primary declaration of the inherent and indefeasible right of property, followed by the clauses guarding it against specific transactions, that covers it with an ægis of protection against all unjust, unreasonable, and palpably unequal exactions, under any name or pretext. Nor is this sanctity incompatible with the taxing power, or that of eminent domain, where, for the good of the whole people, burdens may be imposed or property taken. I admit that the power to tax is unbounded by any express limit in the constitution; that it may be exercised to the full extent of the public exigency. I am aware that it differs from the power of
103, 104 eminent domain, and has no thought of compensation by way of return for that which it takes and applies to the public good—further than all derive benefit from the purpose to which it is applied. But nevertheless taxation is bounded in its exercise by its own nature, essential characteristics and purpose. It must, therefore, visit all alike in a reasonably practicable way, of which the legislature may judge, but within the just limits of what is taxation. Like the rain, it may fall upon the people by districts and by turns; but still it must be public in its purpose, and reasonably just and equal in its distribution, and cannot sacrifice individual right by a palpably unjust exaction. To do so is confiscation, not taxation; extortion, not assessment; and it falls within the clearly implied restrictions of the bill of rights.

Therefore, while we concede the wide range to be given to legislative discretion in adapting the means to the end, that is, to the purpose of local government, there is a limit beyond which the legislative
105 power cannot sacrifice the sacred right of private property. This limit is reached when it palpably and plainly sacrifices this right which the people themselves have jealously guarded against transgression in their fundamental law. There must be, therefore, a reasonable appropriateness in the means employed to execute the legislative purpose. This has been well expressed by Chief Justice Marshall, that bright luminary of constitutional law, in discussing the power of Congress under the 19th clause of the 8th section of the 1st article of the Federal Constitution, to make all laws necessary and proper for carrying into execution the Federal powers: "But we think (he said) the sound construction of the Constitution must allow to the national legislature that discretion with regard to the means by which the powers it confers are to be carried into execution which will enable that body to perform the high duties assigned to it in the manner *most beneficial* to the people.

"Let the end be legitimate, let it be within the *scope* of *the Constitution*, and all *means* which are *appropriate* which *plainly are adapted to that end* which are *not prohibited* but *consist* with the *letter*
106 and *spirit* of the Constitution, are constitutional." (McCullough v. Maryland, 4th Wheaton, 316.) The italics are mine. This was said by that great jurist of an express power to pass all laws necessary and proper to execute expressly conferred powers—the means must be

appropriate—must be plainly adapted to a legitimate end, one not prohibited, but consistent with the letter and spirit of the Constitution. How much stronger, then, does the language apply to a case like this, where no express power over the means is given, but the power is left to be inferred only from its appropriateness.

The taxing power conferred on the city, therefore, cannot extend to such a case as this, where a ruinous burthen is laid on land wholly rural and outside of the city proper for purely local and city objects in which Mr. Kelly, the owner, has no interest. This distinction between local taxation for purely local purposes and general taxation by the State, in which all are interested, cannot be overlooked or thrust aside. It is the very pivot of the question. (People v. Mayor of Brooklyn, 4 Comst., 419; Moore v. Stokes, 1 Allen 159.) It is not the extension of boundary which is unconstitutional, but it is the imposition of
107 a burthen, where it is palpably and flagrantly unjust and contrary to common right. (Bradshaw v. Omaha, 1 Neb., 16.)

We are not without very respectable and numerous precedents for the doctrines contended for. The very point in question is decided in the following cases: Cheany v. Hoover, 9 B. Monroe, 330; Covington v. Southgate, 15 B. Monroe, 491; Morford v. Meyer, 8 Iowa, 82; Langworthy v. Bubuge, 13 Iowa, 86; Fulton v. Davenport, 17 Iowa, 404; Bradshaw v. Omaha, 1 Neb., 16. The opinions in some of these cases are elaborate, well considered, and very convincing to my mind. Much of the answer given to this view of the natural right of property secured by constitutional limitations is a mere criticism on words. Thus it is said the protection claimed refers only to the power of eminent domain, which relates to a taking, not a taxation of property. Even this clause is entitled to a liberal interpretation (Pearce Harris v. Patton, 7 B. Monroe). But the declaration of rights does not confine its protection to this clause, when it declares the inherent right of private
108 property, and places it on the same high plane of protection as the rights of life and liberty, or when it declares that the possessions of the people, as well as their persons, houses, and papers, shall be secure from unreasonable seizures, and when it asserts that free governments are instituted for their peace, safety, and happiness. Indeed, the whole circle of fundamental rights rise up in earnest protest against the doctrine of the absolute despotism of legislative power over property; while the clause relating to the power of eminent domain only strengthens the protest. It is not the province of the courts, which stand between the citizen and the abuse of power by public servants, to fritter away these clauses to mean next to nothing. Eminent domain is simply high and eminent domain, and is but another name for sovereignty. Specially it is but one of the powers of sovereignty, which includes the taxing power, as well as that which takes. Taxation exacts of the owner of property a share of the public burdens as his just proportion for the benefits received from the government. Eminent domain goes a step further and takes more than a just share, and therefore awards compensation for the excess (People v. Burkley, 4
109 Comstock, 420); but it is evident that both are founded on the consideration of benefits conferred in some form. Sovereignty in a constitutional government under a bill of rights imparts no arbitrary power for any purpose. What is taxation but a delegated power; and therefore subject to the fundamental rights of men, which government is intended to protect, when the exercise of this power conflicts with them without just cause? If the power to tax be absolute and unbounded by just cause, there is no protection whatever. You cannot

take property without just compensation, but you may tax it to destruction; you may not lop off a limb or cut off the head without a just cause, but you may bleed the whole trunk to death. Or if you cannot find a good cause, you may presume it; or you may find it in some infinitissimal quantity to furnish a pretext. Kirby v. Shaw, 7 Harris, 259, a case admitted on the verge of the taxing power, contains probably the strongest expressions of the absolute character of the taxing power; yet these must be taken in reference to the case itself which calls them forth, and it was one where a specific benefit was conferred
110 on the borough of Towanda, and the chief justice made this the corner-stone of his argument.

In discussing this question, the advocates of unlimited power ignore the distinction so palpable between the general power of taxation for the benefit of the whole State, though laid in districts, and the imposition of local burthens in return for specific benefits. As to the former, all men participate more or less in the general advantages of government; but there can be no such postulate for the latter, where it is palpably clear the local burthen is imposed without just cause, and is plainly for the benefit of others. And a court must regard a substantial return, not a merely speculative or shadowy benefit, which amounts to no more than a pretext. When, therefore, the exercise of the power of local taxation is manifestly arbitrary, and palpably unjust, and without just cause; when, according to Chief Justice Marshall, it is not "appropriate" to the true purpose of local or city government, it is not constitutional, it infringes the fundamental rights of the citizen, and is void.
111 This is the rule laid down in Sharpless v. City of Philadelphia, 9 Harris, 164, and many other cases to determine the constitutionality of laws: Fletcher v. Peck, 6 Conn., 87; Cooper v. Telfaw, 4 Dallas, 14; Eakin v. Raub, 12 S. & R., 339; Commonwealth v. Smith, 4 Binney, 123; Cheany v. Hoover, 9 B., Monroe, 330; Morford v. Meyer, 8 Iowa, 82; Bradshaw v. Omaha, 1 Neb., 16.

In this case it is probably clearly plain that as to gas, water, fire, and police, Kelly's farm is taxed for purely city purposes in which it has no share. It is perfectly manifest that his money is transferred to a local use for the benefit of others. Why, then, shall a court hesitate to pronounce the burthen contrary to right and void? No stronger authority will be found for the principle I have insisted upon than the decision of the whole court in the case of the bridge over Saw Mill Run, argued last November, at Pittsburgh.

The very foundation of the opinion of Justice Woodward is the absence of peculiar benefit to the property assessed. On the doctrine of general benefits or a supposed or infinitessimal benefit, the assessment was valid. Its rejection proves that this court does look at the
112 nature and practical operation of the charge, and the want of any substantial return for the taxes in local taxation.

Reference is made to the Kitty Roup case as covering this. That is a mistake. It decides one point only, the power under the new constitution to classify the subject of taxation; but the power to classify is essentially different from the power to impose any tax. Classification implies that the subject is taxable for a proposed purpose; but one question is upon the power to impose any tax for gas, water, fire and police. The classification into urban and rural, the only point in the Kitty Roup case that had a majority of the court, does not determine whether the rural is subject to a tax for merely city purposes. Some rural properties may be subject, for they may have the benefit of gas, water, po-

lice, and other city advantages; but when the property is, as here, a farm not subject to the tax for these city purposes, it is manifest that classification has nothing to do with the case. Classification merely reduces the amount of the tax on the subject of the classification
113 (when it is a taxable subject) to two-thirds its value; but the point made in this case is that the subject is not taxable at all for these purely city uses, and the tax is therefore illegal in whole and in part. It is not taxable for two-thirds or any other proportion. It is not a tax for those general purposes which concern the State, such as county, poor, road, and school tax. That would bring the case within the general taxing power. In such a case it is immaterial whether the tax is imposed over the State at large or in districts, for the purposes are those of general advantage. We have arrived just at that point in the history of local taxation where, in my judgment, this court should stand firmly as the bulwark of human rights, to prevent their sacrifice in detail and by gradual encroachment. If the rights of property can be taken or taxed away without a justifiable cause to bring the legislative act within the just powers of government, it is confiscation, not legal contribution. Planted on the broad foundation of the rights of men, I shall stand alone, if no one go with me, in the defense of
114 constitutional liberty, opposed to every scheme of plunder, however gilded or bright, which the tenants of municipal places may devise.

115 *Copy of bond.*

Know all men by these that we, William Stevenson, of #48 Fifth Avenue, in the city of Pittsburgh, county of Allegheny and State of Pennsylvania, and John F. McCombs, of Wilkinsburg, Wilkins Township, county of Allegheny and State of Penn'a, are held and firmly unto the city of Pittsburgh in the full and just sum of two hundred dollars ($200), to be paid to the said city of Pittsburgh, her certain attorney, agent or assigns, to which payment, well and truly to be made, we do bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 22d day of January, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas lately, at Pittsburgh, in a suit depending in the supreme court of Penn'a, between James Kelly, complainant, and The City of Pittsburgh was respondent, at No. 172 of Oct. and Nov. term, A. D. 1876, of said court, a final decree was rendered against the said James Kelly, and the said James Kelly having obtained a writ of error and filed a copy thereof in the clerk's office of the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said city of Pittsburgh, citing and admonishing to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such that if the said James Kelly shall prosecute the said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the
116 above obligation to be void, else to remain in full force and virtue.

WILLIAM STEVENSON. [SEAL.]
JOHN F. McCOMBS. [SEAL.]

Sealed and delivered in presence of—
ALBERT N. SUTTON.

I, H. D. Gamble, clerk of the circuit court of the United States for the western district of Pennsylvania, do hereby certify that the within named obligors are known to me to be perfectly good and responsible fors the within named amount.

H. D. GAMBLE,
Clerk of U. S. Cir. Court, W. D. of Pa.

Approved by—

W. STRONG, *J.*

117 The United States of America to The City of Pittsburgh, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Pennsylvania, wherein James Kelly is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the decree rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable William Strong, associate justice of the Supreme Court of the United States, this sixth day of February, in the year of our Lord one thousand eight hundred and seventy-eight.

W. STRONG, *J.*

FEB'Y 7, 1878.—Service accepted.

THOS. S. BIGELOW,
Att'y for City of Pittsburgh.

118 On this seventh day of February, in the year of our Lord one thousand eight hundred and seventy-eight, personally appeared Albert N. Sutton before me, the subscriber, prothonotory of the supreme court of Pennsylvania, and makes oath that he delivered a true copy of the within citation to Thomas S. Bigelow, esq., attorney for the city of Pittsburgh.

Sworn to and subscribed the seventh day of Febr'y, A. D. 1878.

ALBERT N. SUTTON.

(Indorsed): 172. O. & N. T., 1876. Filed Feb'y 7, 1878.

119 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Pennsylvania, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between James Kelly, complainant, and The City of Pittsburgh, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United
120 States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the

United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said James Kelly, as by his complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the seventh day of February, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—

W. STRONG, *J.*

FEB'Y 7, 1878.—Service accepted.

THOS. S. BIGELOW,
Att'y for the City of Pittsburgh.

(Indorsed): 172. O. & N. T., 1876. Filed Feb'y 7, 1878.

121 *Assignments of error.*

Supreme Court of the United States, No. , term 1878.

JAMES KELLY
vs.
THE CITY OF PITTSBURGH.

First. The supreme court of Pennsylvania erred in sustaining the authority of the city of Pittsburgh to assess and collect taxes from complainant's farm lands for municipal or city purposes, such exercise of the taxing power being a violation of the rights of complainant as guaranteed to him by Article V of amendments to the Constitution of the United States.

Second. The supreme court of Pennsylvania erred in sustaining the authority of the city of Pittsburgh to assess and collect taxes from complainant's farm lands for municipal or city purposes, such exercise of the taxing power being a violation of the rights of complainant as guaranteed to him by article XIV, section 1, of the amendments to the Constitution of the United States.

Third. The supreme court of Pennsylvania erred in affirming the decree of the court of common pleas of Allegheny County, in dismissing the exceptions to the master's report and in decreeing that complainant's bill be dismissed with costs, said exceptions being as follows, to-wit:

"First. Complainant excepts to the master's report of facts as wanting in the certainty justifiable by the direct allegations of the bill, and the weight and character of the evidence, defendant having introduced no

evidence controverting any of complainant's material allegations,
122 or in support of the issue raised by the answer. The master should have found directly and positively that all the material allegations of complainant's bill were sustained.

"Second. Complainant, under the facts as set forth in his bill and the evidence thereon, denies the right of the city of Pittsburgh to subject the land in question to taxation for municipal purposes, claiming that such exercise of the taxing power by the city of Pittsburgh is in violation of section 10 of article 1 of the constitution of the commonwealth. The constitutionality of the entire tax as levied for municipal purposes, and not errors of assessment or irregularities of burden arising therefrom, constitutes the issue. And the master, in his report of his conclusions of law, should have confined himself to the material issue. Complainant therefore excepts to all that portion of the master's report relating to the law regulating assessments and authorities cited thereon, as also to all that portion of said report relating to the authorities cited on inequalities of taxation, as not bearing upon the issue and being irrelevant matter tending to encumber the record and embar'ass the real issue should therefore be stricken from the record.

"Third. The master finding from the evidence the fact that the city does not extend to this property, the considerations which the supreme court of Pennsylvania have held to be essential requisites to justify the exercise of the taxing power for either general or local purposes, the master should have found as a legal consequence that complainant's farm was not liable to taxation for municipal purposes, and therefore
123 entitled to relief from the following taxes as stated in the city's statement of assessments as set out in the master's report, to wit:

City tax, 4 mills	$876 40
City building, ¼ mill	54 90
Fire, 1 mill	219 60
W. W. Int. & S. F., 1½ mills	329 40
City school	634 76

"Fourth. The master finding complainant's farm land unchanged by and receiving no benefits from consolidation, the master should have found that said farm lands were subject to taxation for only such purposes as the same were subject to previous to consolidation, or that similar property is subject to without the city boundaries, and that by the act of consolidation the municipal authorities became and were, ex officio, authorized to collect and disburse the same.

"Fifth. The issue raised by complainant's bill resting upon a provision of the constitution of the State of Pennsylvania identical with the provision of the constitution of the State of Kentucky, and the supreme court of Pennsylvania having adopted the construction put upon this provision by the supreme court of Kentucky, complainant therefore excepts to the conclusion arrived at by the master, "that the law is different in Pennsylvania," as being unsustained by either evidence or authority.

"Sixth. Complainant excepts to the quotation made by the master of the rule adopted by the supreme court of Iowa in the case of Mitchell vs. Davenport, 34 Iowa, 192, as setting forth but a portion of said rule, and the portion so quoted by the master is not applicable to the facts as set forth in complainant's bill and the evidence adduced before the master.

124 "Seventh. Complainant excepts to the entire theory, understanding, and treatment of the material issue as set forth by the master

in his report, and he likewise excepts to the finding and the decree in toto as rendered by the master."

And complainant assigns said decree as error.

W. H. & A. N. SUTTON,
Att'ys for plaintiff in error.

(Indorsed:) James Kelly vs. the city of Pittsburgh. Assignments of error. W. H. & A. N. Sutton, att'ys for plaintiff in error.

(Indorsement on cover:) No. 294. James Kelly, plaintiff in error, vs. the city of Pittsburgh. Pennsylvania sup. court. Filed 18th October, 1878.

FILED
MAR 22 1881
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the United States.

NO. 294.

JAMES KELLY, Plaintiff in Error,

vs.

THE CITY OF PITTSBURGH, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA

Brief of Counsel for Plaintiff in Error.

WM. H. SUTTON,
ALBERT N. SUTTON,
LEWIS M. PLUMER,
Of Counsel for Plaintiff in Error.

PITTSBURGH:
FROM THE PRESS OF STEVENSON & FOSTER, 151 WOOD STREET.
1881.

IN THE

SUPREME COURT OF THE UNITED STATES.

JAMES KELLY, Plaintiff in Error.

vs.

THE CITY OF PITTSBURGH, Defendant in Error.

No. 294.

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF OF COUNSEL FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This case presents the appeal of the citizen for protection of the rights of property guaranteed to him, by the Fourteenth Amendment to the Constitution of the United States, from the destructive assumption of power by a municipal corporation, acting under claim of legislative authority.

The plaintiff in error in the second paragraph of this bill (page 2 of record) charges: "That defendant city, with the

single purpose and intention of increasing her revenues * * * * * was instrumental in procuring an Act of the Legislature extending the terminal limits of the city of Pittsburgh."

The verity of this charge is shown in the history of the legislation and the record of the city, claiming to act under it, to-wit:

At the session of the Legislature of 1867, the city of Pittsburgh procured the passage of an Act of Assembly entitled, "A further supplement to the acts incorporating the City of Pittsburgh, extending the boundaries, enlarging the coporate powers, and perfecting its municipal organization, and submitting the proposed consolidation to a vote of the people," which Act was approved April 6, 1867. (P. L. page .)

SECTION 1. Provided for certain boundaries to be run by commissioners, &c., &c.

SEC. 2. Provided, That the Sheriff of Allegheny county should give notice that each qualified elector, residing within the boundaries, (provided for by section 1,) is required to vote a ticket marked, &c., For Consolidation or Against Consolidation, &c., &c., * * * and divided the territory into three voting districts, viz:

First, or Central District, consisting of the city of Pittsburgh, the borough of Lawrenceville, and the townships of Pitt, Oakland, Collins, Liberty and Peebles, (this being the territory lying between the Allegheny and Monongahela rivers).

Second included the territory lying north of the Allegheny river.

The Third, the territory lying south of the Monongahela river.

At the election held in pursuance of the provisions of this section, October 10, 1867, the first, or central district voted in favor of consolidation, the second and third districts against it.

It will be observed that the only district voting in favor of consolidation was the one includlng the then city of Pittsburgh, the borough of Lawrenceville, and the five townships of Pitt, Oakland, Collins, Liberty and Peebles. The influence of the city of Pittsburgh as a factor in such a voting district is best shown by reference to the comparative population of

the respective portions, as shown by the census returns for the years of 1860 and 1870, (*the election taking place October* 10, 1867).

The city of Pittsburgh in 1860 contained		49,217.
Borough of Lawrenceville in 1860 contained		3,262,
Peebles tp. *then* including Liberty,		2,770,
Pitt tp. *then* including Oakland,		3,084,
Collins township, - -	2,027,	
Total five townships, -	7,881.	7,881,
Total excluding city of Pittsburgh,		11,143.
The census of 1870 shows an increase of—		
The old city of Pittsburgh to		56,252,
New territory	"	30,002.

These figures show the proportionate relation of the city of Pittsburgh at this election, while as an actual fact the majority in the old city *in favor* of consolidation was 3,556 when the total vote of the borough of Lawrenceville and the five townships was but 2,156, a majority of which was *against* consolidation.

No elaboration is necessary to sustain the conclusion that it was the intention upon the part of the framers of the Act of Assembly to consolidate this territory with the city of Pittsburgh, and to render the pretended expression of their wishes by the inhabitants thereof a senseless farce.

An examination of the area of the territory thus annexed gives additional light upon the intent of the law framers, and brings out more strongly the wrong sought to be accomplished thereby. Previous to consolidation the area of the city of Pittsburgh was 1,366 acres. The annexed territory contained an area of 14,120 acres, or an increase of more than ten fold in territorial limits. This territory was afterwards divided by the city into twenty-three wards, the first twelve of which constitute the old or city of Pittsburgh before consolidation, the remaining eleven the territory annexed.

To make a comparison of the territory as to its relative condition as municipal or rural, as shown by population and territorial area, we present the following table of area, &c.:

ORIGINAL CITY.

Ward.	Population.	Area.	Population to the Acre.
1	4,336	145 acres.	30 to each acre.
2	4,061	83 "	50 " "
3	2,652	50 "	53 " "
4	3,332	128 "	26 " "
5	4,902	36 "	136 " "
6	7,847	200 "	39 " "
7	4,783	43 "	111 " "
8	5,648	69 "	82 " "
9	4,934	74 "	67 " "
10	3,198	73 "	38 " "
11	4,862	150 "	32 " "
12	6,697	305 "	21 " "
12 Wards.	56,352	1,366	41 average of old city.

ANNEXED TERRITORY.

Ward.	Population.	Area.	Population to the Acre.
13	3,329	833 acres.	4 to each acre.
14	4,703	1,080 "	4 " "
15	3,290	184 "	17 " "
16	3,090	283 "	10 " "
17	5,161	535 "	9 " "
18	822	1,225 "	1 to each 1½ acres.
19	2,448	1,370 "	1⅔ " "
20	2,273	1,040 "	2 " "
21	2,502	1,975 "	1¼ " "
22	986	3,575 "	1 " 4 "
23	1,398	2,020 "	1 " 1½ "
11 Wards.	30,002	14,120	2 av. of new territory.

Showing an average of forty-one to the acre in the old city, while the average in the whole annexed territory is a fraction over two, and in some wards—particularly that of the twenty-second—the area is three times that of the old city, while the population is only one to every four acres, yet this whole territory is assessed and taxed for the benefit of the city proper, or, in fact, and for this purpose we have, as shown by the tax assessor's books, one of the most remarkable instances of the sudden increase of wealth in a city that history affords, to-wit:

In 1873 the valuation of the twelve wards constituting the old city was $11,816,278, and of the eleven wards constituting

the new territory was $4,560,951. In 1874 we have the remarkable increase to $76,041,105 in the twelve wards, and in the eleven wards to $67,819,126, being an increase of six fold in the old city and of fifteen fold in the newly annexed territory, while in some of the new territory the increase was much greater—being in the twenty-second ward about thirty fold, and in the twentieth ward about twenty fold.

This phenomenal increase in the assessed value of a city was not without its reason and object. With the increase in territorial limits the city of Pittsburgh entered into a career of extravagant folly that stands unsurpassed in the records of municipal mismanagement and waste, and when on January 1st, 1874, a new constitution containing a clause limiting municipal indebtedness,—article 9, section 8: "The debt of a city shall not exceed seven per centum of the assessed value of the taxable property therein,"—which had been adopted by the people of the Commonwealth, took effect, it found the city government in the midst of its foolish career. The limit had been reached, the total valuation of 1873 being $16,377,229 and the municipal debt $7,527,390.15. But more money was needed; and, although the panic of 1873 had prostrated business and caused a wonderful shrinkage in values, the city magnates raised the total valuation in 1874 to $140,860,231, and increased the municipal debt to $11,943,373.67, thus bidding defiance to the spirit of the Constitution, and rendering null and of no effect, the limitations and supposed protection contained in its restrictive clauses,—sustained in their course by the courts of Pennsylvania, their political power closed the door to legislative relief until to-day want and poverty mark the homes of a once prosperous farming community. Such is a general outline of the course pursued by the city of Pittsburgh, and of the wrongs of which the plaintiff in error is a representative sufferer.

James Kelly, the plaintiff in error, is and has been for more than sixty years past the owner of a farm, eighty acres of which are located in what was formerly Collins township, now the twenty-first ward of the city of Pittsburgh, and situate about seven miles east of the city of Pittsburgh.

This eighty acres comprises a portion of a farm, always

heretofore, and now, exclusively appropriated to agricultural and dairy purposes, and never, in any manner, dedicated, offered, or laid out for the use of a town or a city by the owner thereof, James Kelly. As a city in fact, demonstrated by houses and population, the city of Pittsburgh does not approach these lands by a mile or more in distance, and between them and the compact portions of the city there are thousands of acres used and occupied for farm or agricultural purposes; and there is no likelihood that these lands will be required by said city to accommodate her possible increase of population for half a century to come.

It is not pretended that the city has, or that she is able, or expects, to extend to these lands any municipal benefits, such as city improvements, streets, gas, police, and sanitary protection, water, or protection from fire, or other benefits, usually the object of city government. And it is also, if not admitted, clearly established by the proof, that neither these lands nor the owner thereof, is in any manner interested or benefited by the disbursement of the money collected as municipal taxes from them. Not a street, nor an alley, not a water nor a gas pipe touches these lands; not a health nor a police officer gives them any attention, nor do they seek or require them for the purposes to which they are applied by their owner.

The city of Pittsburgh, notwithstanding the existence of the foregoing potential facts, has for years assessed these lands as city property, and annually collected from the owner thereof, mainly for city uses, to-wit:

Year.	Acres of Land.	Value per Acre.	Total Valuation.	County Tax.	City Tax.	School Tax.	Total.
1867	80	$ 73.00	$ 5,840	$ 62.86	$	$ 122.06	$ 184.53
1868	80	73.00	5,940	74.11	98.73	99.80	273.64
1871	80	90.00	7,200	96.46	99.96	222.60	416.12
1872	80	90.00	7,200	89.04	117.55	244.06	451.45
1873	80	90.00	7,200	89.04	462.73	246.86	798.63
1874	80	3,967.00	317,360	476.07	2,247.76	396.70	3,148.55

Without claiming to have bestowed upon them city or municipal protection, or extended any of the benefits resulting from the expenditure of municipal revenue, and when the proof positively shows that the city government does not extend these essential considerations, requisite and necessary to justify the right to tax.

There is no *city in fact* in which these lands are included

and a *city in law*, made so by legislative extension and boundaries, confers no right to levy municipal taxes. The lands in question are agricultural only, by the owner never appropriated to town or city uses; nor are they for any purposes required by the city of Pittsburgh, in order to accommodate her population or encourage and sustain her manufacturing or commercial enterprises; but have been included, against the consent of the owner, for taxation only; thus imposing destructive burdens on his property to lessen the burdens of the citizens of the older portions of said city. The tax in question has no other purpose, and has no pretence to other justification. To the State, county, township, road, and school taxes there is no objection. They exceed $800.00 per annum; but to the municipal tax, exceeding $2,200.00 per annum, the objection is, that the land in question is not within the taxing power of the city. That the assumption of this power by the city is not protective or benificent, is not so designed, but destructive and consumptive of all property rights; ruinous to the owner, to which he cannot submit and retain one dollar of his property, the proceeds of which go directly to objects and purposes in which he has no interest, and from which to him accrue no benefits. "That his private property is thus taken or applied to public use, without authority of law, and without just compensation being first made or secured."

It is not a question of degress, as much or little, but one of right and consequent power. He does not ask for a reduction of taxes, but denies the right of said city, under the circumstances, to tax these lands for city purposes, and that the constitutional provision is broad enough to protect him, and if enacted for any, it was this purpose.

It is not the exercise of discretionary power that is called in question, but usurpation, where neither power nor discretion exist in the city of Pittsburgh that plaintiff complains of, and to protect him, he very respectfully invites the judicious interposition of the Honorable Court.

ASSIGNMENTS OF ERROR.

First. The Supreme Court of Pennsylvania erred in affirming the decree of the Court of Common Pleas of Allegheny county, dismissing the plaintiff's exceptions to the master's report, which exceptions are as follows *seriatim*, viz.:

"1st. Complainant excepts to the master's report of facts as wanting in the certainty justifiable by the direct allegations of the bill, and the weight and character of the evidence, defendant having introduced no evidence controverting any of complainant's material allegations, or in support of the issue raised by the answer. The master should have found directly and positively that all the material allegations of complainant's bill were sustained.

"2d. Complainant, under the facts as set forth in his bill and the evidence thereon, denies the right of the city of Pittsburgh to subject the land in question to taxation for municipal purposes, claiming that such exercise of the taxing power by the city of Pittsburgh is in violation of section 10 of article 1 of the constitution of the commonwealth. The constitutionality of the entire tax as levied for municipal purposes, and not errors of assessment or irregularities of burden arising therefrom, constitute the issue. And the master, in his report of his conclusions of law, should have confined himself to the material issue. Complainant therefore excepts to all that portion of the master's report relating to the law regulating assessments and authorities cited thereon, as also to all that portion of said report relating to the authorities cited on inequalities of taxation, as not bearing upon the issue and being irrelevant matter tending to encumber the record and embarrass the real issue should therefore be stricken from the record.

"3d. The master finding from the evidence the fact that the city does not extend to this property, the considerations which the Supreme Court of Pennsylvania have held to be essential requisites to justify the exercise of the taxing power for either general or local purposes, the master should have found as a legal consequence that complainant's farm was not liable to taxation for municipal purposes, and therefore entitled to re-

lief from the following taxes as stated in the city's statement of assessments as set out in the master's report, to wit.:

City tax, 4 mills, - - - -	$876 40
City building, ¼ mill, - - -	54 90
Fire, 1 mill, - - - -	219 60
W. W. Int. & S. F., 1½ mills, - -	329 40
City school, - - - -	634 76

"4th. The master finding complainant's farm land unchanged by and receiving no benefits from consolidation, the master should have found that said farm lands were subject to taxation for only such purposes as the same were subject to previous to consolidation, or that similar property is subject to without the city boundaries, and that by the act of consolidation the municipal authorities became and were, *ex officio*, authorized to collect and disburse the same.

"5th. The issue raised by complainant's bill resting upon a provision of the constitution of the State of Pennsylvania identical with the provision of the constitution of the State of Kentucky, and the Supreme Court of Pennsylvania having adopted the construction put upon this provision by the Supreme Court of Kentucky, complainant therefore excepts to the conclusion arrived at by the master, "that the law is different in Pennsylvania," as being unsustained by either evidence or authority.

"6th. Complainant excepts to the quotation made by the master of the rule adopted by the Supreme Court of Iowa in the case of Mitchell *vs.* Davenport, 34 Iowa, 192, as setting forth but a portion of said rule, and the portion so quoted by the master is not applicable to the facts as set forth in complainant's bill and the evidence adduced before the master.

"7th. Complainant excepts to the entire theory, understanding and treatment of the material issue as set forth by the master in his report, and he likewise excepts to the finding and the decree in toto as rendered by the master."

And complainant assigns said decree as error.

Second. The said Supreme Court erred in affirming the decree of the said Court of Common Pleas, the effect of which was to make the plaintiff's farm liable for taxes levied exclusively for the purposes of the old built up city, and to make him pay money for taxes for purposes in which he had no in-

terest general or special, thus causing his private property to be taken unlawfully, contrary to the 1st section of the 14th amendment of the Constitution of the United States.

Third. The said Supreme Court erred in affirming the decree of the said Court of Common Pleas, which affirmed the following portion of the report of the master, viz.: "The averment in the bill (section 13) by Mr. Kelly that the assessment of his land and assessment of taxes are many times more than the cash or commercial value thereof, &c., is denied by the answer, which puts the burden of proof on him, and the evidence to overcome the denial in the answer must be that of two witnesses, or what is equivalent thereto. Proof that the property is comparatively unproductive, I think, is far from sufficient in opposition to the answer to establish the charge that this assessment is more than the commercial or cash value of the land." There being no such denial in the answer or in the record, and no such measure of proof required; and the statement being contrary to the master's own finding of facts that there was no rise in value of the land by incorporation into the city limits.

Fourth. The said Supreme Court erred in not sustaining the first exception to the master's report, on the greund that the master found an exaggerated and false cash or commercial value of the plaintiff's farm without evidence and contrary to the record and his own findings of fact.

Fifth. The said Supreme Court erred in holding, contrary to the 2d, 3d, 4th and 7th exceptions, that the special city taxes referred to in the 3d exception were for purposes for which the plaintiff's farm was liable to taxation, thereby violating the provisions of the 1st section of the 14th amendment of the Constitution of the United States.

Sixth. The said Supreme Court erred in affirming the decree of the said Court of Common Pleas, making the plaintiff liable for *all* the taxes levied by the said city on his farm, including therein those taxes for the exclusive benefit and purposes of the inhabitants of the old built up city, thus making the plaintiff liable for taxes on his farm for which his property was not liable, and thereby violating the provisions of the 1st section of the 14th amendment of the Constitution of the United States.

ARGUMENT.

The first question to which the attention of the Honorable Court is directed, is the substantive averment in the second paragraph of the bill, to wit: "That defendant (city) with the single purpose and intention of increasing her revenue, without any regard to the property rights or wishes of complainant, and without extending municipal benefits of any kind to him, and against his will, included his farm within her limits, knowing its character, and that it was not required for city purposes, but that she might tax it." Is this allegation true? The Act extending the territorial boundaries of the city, commonly called the Act of Consolidation, became a law on the 6th of April, 1867, and up to the present time, not a single municipal benefit, improvement, or convenience of any kind, has been extended to the land in question, nor has the city demand for territory increased. The intention charged in this paragraph is to be ascertained by the city's acts and conduct; they speak for themselves, and judged by them, the truth of the allegation is beyond controversy. Complainant's evidence—depositions of Samuel Chadwick, John F. McCombs, J. M. Rowan, Samuel B. Ross, Wm. Jas. Clark, Jacob Hartman, A. M. King, John D. Patterson, and E. O. Anderson—establishes the truth of the allegation, and also that the land in question, always heretofore and at present, is farm land. "That the city of Pittsburgh has not laid off the said land by streets, lanes, alleys or lots. That no additional roads have been made to or from it, and that the old roads extending to it are not kept in as good condition as before the consolidation, or before they were included within city limits." That a large amount of territory lays between these lands and the city, used as farm lands, with no city improvements thereon, and no act on the part of said city looking towards city appropriation or city improvements, except *enormous taxation*, unless it be a survey, made by city authority many years since. That complainant has never laid out this 80-acre farm into lots or appropriated them to city purposes in any manner whatever. That the McCombs lands (60 acres), the Ferry property and others, lay between it and the city, all of which

is used for agricultural purposes. That all the lands adjoining complainant's farm, except Mellon's plot, at Homewood, are used for farming purposes. That no benefits have accrued to these lands since they have been brought into the city. That more than 1,000 acres, north and west of these lands, are woods or farm land only. That the nearest city improvement is Penn avenue, two-thirds of a mile distant. That the city of Pittsburgh does not send her police force out to that farm. That complainant's lands, since taken into the city, remain precisely as they were before they were taken in, and no increased demand for this property. All the witnesses, and their personal knowledge of the said lands extends from ten to sixty years, concur in their testimony, and establish beyond controversy every material allegation of the bill as to the character, use and situation of complainant's farm, likewise the acts of defendant (city) and the acts and intention of complainant in regard to his farm.

In his report the master finds that "Mr. Kelly's land (complainant) does not need for the purposes for which it is used water from the city works; that it is sufficiently watered by springs, wells, &c.; that the old roads accommodate the land sufficiently for the purposes for which it is used; that the fire department does not act that far out, and could not be made available there for want of water, and that the police do not extend their visits that far out."

The evidence in the case and the master's report show that the fire tax is $219.60, and water works, &c., tax is $329.40. The municipal poor tax is $158.69, and city school tax $634.76, independent of the ward school tax, which is $396.73. The master attempts an explanation of this, by alluding to the equalized and county valuation. All the allegations of the bill, in regard to the extent of the municipal burdens imposed on the farm question, are sustained by the evidence and the report of the master.

What complainant seeks at the hands of this Honorable Court is, the application of the existing law as tested by the rights of property guaranteed to him by the constitution to the facts of the case, as presented by the bill and the evidence and the report of the master, so far as his report is in conformity with the testimony.

The Courts have held, in numerous cases, that the power of the Legislature, or any subordinate municipal authority, to impose taxes is limited to such property as receive the benefit of its protection, and for such purposes as the people from whom they are exacted have an interest; and held that an Act authorizing the imposition of taxes beyond these limist would not be a law, and not within the scope of legislative authority, and that the exaction of taxes beyond these just limits is confiscation, not taxation; extortion, not assessment. Sharpless *vs.* Mayor of Philadelphia, 9 Harris, 147. "By taxation is meant a certain mode of raising revenue for a public purpose, in which the community that pays has an interest. The right of the State to lay taxes has no greater extent than this."

"An Act of the Legislature, authorizing contributions to be levied for a purpose, though public, in which the people from whom they are exacted have no interest, would not be a law but a sentence commanding the periodical payment of a certain sum by one portion or class of people to another." *Ibid.*

"Whenever a local assessment upon an individual is not grounded upon and measured by the extent of his particular benefit, it is, *pro tanto*, a taking of his private property for public use without any provision for compensation." Hammett *vs.* Philadelphia, 15 P. F. Smith, 153.

"So long, therefore, as a law faithfully and reasonably provides for a just assessment according to the benefits conferred, and does not impose unfair and unequal burdens, it cannot be said to exceed the legislative power of taxation, when exercised for proper objects. It is on this ground only that local assessments is to be justified." Washington avenue, 19 P. F. Smith, 352.

"The taxing power rests upon the reciprocal duties of protection and support between the State and the citizen, and the exclusive sovereignty and jurisdiction of the State over the persons and property within its territory." McKeen *vs.* county of Northampton, 13 Wright, 524.

"Taxation is correlative with protection. It is applicable to all property and rights created or protected by the law." Pittsburgh, Fort Wayne and Chicago Railroad Company *vs.* the Commonwealth, 16 P. F. Smith, 73.

is used for agricultural purposes. That all the lands adjoining complainant's farm, except Mellon's plot, at Homewood, are used for farming purposes. That no benefits have accrued to these lands since they have been brought into the city. That more than 1,000 acres, north and west of these lands, are woods or farm land only. That the nearest city improvement is Penn avenue, two-thirds of a mile distant. That the city of Pittsburgh does not send her police force out to that farm. That complainant's lands, since taken into the city, remain precisely as they were before they were taken in, and no increased demand for this property. All the witnesses, and their personal knowledge of the said lands extends from ten to sixty years, concur in their testimony, and establish beyond controversy every material allegation of the bill as to the character, use and situation of complainant's farm, likewise the acts of defendant (city) and the acts and intention of complainant in regard to his farm.

In his report the master finds that "Mr. Kelly's land (complainant) does not need for the purposes for which it is used water from the city works; that it is sufficiently watered by springs, wells, &c.; that the old roads accommodate the land sufficiently for the purposes for which it is used; that the fire department does not act that far out, and could not be made available there for want of water, and that the police do not extend their visits that far out."

The evidence in the case and the master's report show that the fire tax is $219.60, and water works, &c., tax is $329.40. The municipal poor tax is $158.69, and city school tax $634.76, independent of the ward school tax, which is $396.73. The master attempts an explanation of this, by alluding to the equalized and county valuation. All the allegations of the bill, in regard to the extent of the municipal burdens imposed on the farm question, are sustained by the evidence and the report of the master.

What complainant seeks at the hands of this Honorable Court is, the application of the existing law as tested by the rights of property guaranteed to him by the constitution to the facts of the case, as presented by the bill and the evidence and the report of the master, so far as his report is in conformity with the testimony.

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"The contract characterized her as a trustee in fact by her own act, and draws to it the protection of the laws of Pennsylvania, and to this extent she is liable to taxation as the price she must pay for the privilege." Lewis *vs.* county of Chester, 10 P. F. Smith, 329.

"For State purposes it is right enough to tax them, because the safety and value of the funds depends on the existence of the government which such taxes go to support, and possibly something of the same reason may apply in behalf of county taxation, but what protection or value does the borough of Carlisle give the funds invested in Philadelphia?" Borough of Carlisle *vs.* Marshall, 12 Casey, 402.

"What are taxes but the revenue collected from the people for objects in which they are interested?" Hilbish *vs.* Catherman, 14 P. F. Smith, 159.

The foregoing decisions establish the general principles and lay down the rule governing taxation, and it rests upon no other foundation. What benefit, what protection, what value does the city of Pittsburgh confer upon the lands in question? None; the evidence shows this fact positively. The master's report shows the Court that the fire department of defendant (city) "does not act that far out," yet defendant taxes the said farm with a fire tax of $219.60. Again, the master's report shows the Court that the fire department of defendant could not be made available to the land in question for want of water, and the defendant taxes these lands for water and water works $329.40. The master further showing that springs and wells alone supply water to this farm. Now for what purposes are these taxes levied? They are levied for private purposes, and supply special wants of the built-up portion of the city of Pittsburgh, or town in fact. Has the property sought to be taxed any interest in the appropriation of the funds thus raised, either direct or indirect? Can the Legislature delegate to the city of Pittsburgh the authority to so impose taxes upon the lands in question? We say not; for "such an act of the Legislature would not be a law, but a sentence commanding the periodical payment of a certain sum by one portion or class of people to another. The power to make such order is not legislative, but judicial, and was not given to the Assem-

bly by the general grant of legislative authority." Sharpless *vs.* Mayor of Philadelphia, 9 Harris, 174, No. 16.

This ruling decision gives the judicial construction of the power given to the Assembly by the general grant of legislative authority, and as such constitutes the rule by which the acts of the Assembly are to be tested, and as such is now to be applied to the Act of April 6, 1867. What is legislative in this act, as tested by this rule? Extension of boundaries, fixing the limits, either by its own acts or prescribing how it shall be done, and delegating the power of taxation, subject to the limitations before mentioned. Whether the Legislature has exceeded the limit in the delegation of the taxing power to the city of Pittsburgh, or whether the city of Pittsburgh is attempting to exercise the power of taxation in excess of that held by the Legislature itself, is a judicial question and to be determined by the Courts.

Where does the defendant (city) get the power or authority to impose these taxes? Her right is disputed. In that case our remedy is by appeal to the judiciary, where alone the parties can be heard, and the standards be applied to the particular case in dispute, and not to the Legislature that gives the rule or standard of civil conduct and civil right, but never judges under the rule or applies the standard to any given case. In no country, much less in no State having a constitution, has the power of the Legislature over taxation been more complete and absolute than in Pennsylvania, yet so palpable are the abuses under this construction of the law, that the Honorable Supreme Court of that State has felt itself constrained to hold, that there were implied limitations in the Constitution on the taxing power, and they were recognized in Durach's appeal, 12 P. F. S., 491.

"There is no limitation of those powers (taxing) expressed in the Constitution of Pennsylvania, as there is in some of our sister States; but, nevertheless, there are limits in the nature of things. The Legislature cannot, under the name of taxation, take private property for public use, without making compensation, and a special tax levied upon an individual or upon particular individuals, would infringe this restriction; for one mode of enforcing its payment is by the seizure and

sale of the property of the delinquent, which is a direct taking."

We have already mentioned the fire and water taxes. We now invite the attention of the Court to the items of city tax, $876.40, city building, $59.90, and city school, $643.76. This school is between seven and eight miles from the said farm, and a high school, for the exclusive benefit of the old portion of the city. The police expenses are included in the item of city taxes, and the master's report says that "the police do not extend their visits that far out." Then, is it not manifest, that here are special taxes or rather contributions imposed on the complainant for special objects for the benefit of others, and for purposes in which he has no interest, and from which he derives no benefit. "Assessments on property peculiarly benefited by local improvements, and in consideration of such benefits, are constitutional; thus far have the judicial decisions in this and other States gone, and no further." 15 Smith, 154. But our position is, that the city of Pittsburgh in this case has gone far beyond such limitation; and we question the legality of her acts in so doing, thereby placing the issue where it belongs, before the judiciary.

In the case of Hammett *vs.* city of Philadelphia, 15 Smith, 149, limitations on the taxing power were found in the Bill of Rights; but it was not so much a limitation of the taxing power as the application of a provision of the fundamental law of the Commonwealth, inserted there for the protection of the property of the citizen against the abuse and perversion of the taxing power, and overshadowing the power of the Legislature as well as the other departments of government, and protecting rights of private property from violation under public authority.

The Court, in this case just cited, say, "In truth it matters not whether an assessment upon an individual or a class of individuals for a general and not a mere local purpose, be regarded as an act of confiscation—a judicial sentence or rescript, or taking of private property for public use without compensation—in any aspect it transcends the power of the Legislature and is void. I regard it as a forced contribution. It certainly cannot alter the case to call it taxation. When-

ever a local assessment upon an individual is not grounded upon, and measured by, the extent of his particular benefit, it is, *pro tanto*, a taking of his private property for public use without any provision for compensation. That clause in the Declaration of Rights is, indeed, the sheet-anchor of private property, the security of which against the government as well as all others, is intended in the first section of the ninth article, "all men have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." The dollar which the poor man has earned by the sweat of his brow —the fortune which the rich man has inherited from his ancestors—stand on the same rock, and are surrounded and protected by the same barrier. Invested for comfort and assurance against the want or sickness or old age, or cherished as a provision for widow or orphan after he has gone, it is a right which it is despotism to take from him except for the necessary purposes of government by equal and just taxation. It is the solemn duty of the judiciary, under our Constitution, to guard and protect this right of property, as well from indirect attacks, under any spacious pretext, as from open and palpable invasion. There being, says Chief Justice Marshall of Kentucky, no express constitutional declaration or prohibition directly applicable to the powers or subject of taxation, and none which, in terms, secure equality or uniformity in the distribution of public burthens, either general or local, there is no clause to which the citizen can, with certainty, appeal for protection against an oppressive and ruinous discrimination under color of the taxing power, unless it be that which prohibits the taking of private property for public use without compensation. This is the great conservative principle of the Constitution, by which the rights of private property are to be preserved from violation under public authority; and we should feel bound to give it, as has heretofore been done, a liberal construction for the attainment of so important and valuable an object. To the same effect in the Washington avenue, 19 P. F. Smith, 352. In the latter case, it is said "the power to tax is unbounded by any express limit in the Con-

stitution; that it may be exercised to the full extent of the public emergency. Again, "but, nevertheless, taxation is bounded in its exercise by its own nature, essential characteristics and purposes." The limitations now said to be inherent in the nature, characteristics and purposes, is peculiarly applicable to municipal taxation. "The nature and purposes of the tax must determine the district." Cooley on Taxation, 104 *et seq.* Complainant's farm, in question, (80 acres) is taxed $428.47 for State and county purposes, and $396.73 for local school purposes. These are general taxes for State, county and school purposes, assessed equally within the limits of the districts, because protection and benefits arising from the expenditure of the revenue so raised are co-extensive with the boundaries of the State, county and school district.

What now is the "nature, essential characteristics and purposes" of the taxes as levied by the city of Pittsburgh for City Taxes, City Building, W. W. Int. & S. F., Fire, City School, and to what district does the "nature, characteristics and purposes of these taxes limit their exaction?" The Supreme Court of this State have fully determined the district, and fixed the limit by deciding "taxation to be correlative to protection," and that "by taxation is meant a certain mode of raising revenue for a public purpose in which the community that pays it has an interest." The allegations of the second paragraph of the bill, the evidence and the master's report, (so far as any finding of facts can be obtained therefrom) clearly establish the fact that this property does not receive municipal protection, and possesses no interest in the expenditure of the revenue so raised. The nature, essential characteristics and purposes of these taxes show them to be levied for special and local purposes not authorized by territorial boundaries, but resulting from the existence of a town or city in fact, requiring an increased or special protection and the expenditure of revenue for special purposes peculiar to such a community, and the exaction of taxes from either persons or property who do not receive or require this special protection, or possess an interest in the special purposes for which the revenue so raised is expended, is in excess of the authority delegated and a violation of the provision of the Constitution;

for, as stated by Justice Sharswood in Hammett *vs.* Philadelphia, " assessments (taxes or exactions) on property peculiarly benefited by local improvements, and in consideration of such benefit, are constitutional. Thus far have the judicial decisions in this and other States gone, and no further. The creation of the municipal government and benefits arising therefrom and from the expenditure of municipal revenue, are limited or local in their objects and operations, and if the Court is satisfied, from the allegations of the bill, the evidence and the master's report, that the complainant does not receive the peculiar benefit of this local improvement, then such assessments or taxes are unconstitutional and void.

In Cheaney *vs.* Hooser, 9 B. Monroe, 342, Justice Marshall said: " There being no express constitutional declaration or prohibition directly applicable to the power or subject of taxation, and none which in terms secures equality or uniformity in the distribution of public burthens, either general or local, there is no clause to which the citizen can, with certainty, appeal for protection against an oppressive and ruinous discrimination under color of the taxing power, unless it be that which prohibits the taking of private property for public use without compensation. * * * "This is the great conservative principle of the Constitution by which the rights of private property are to be preserved from violation under public authority; and we should feel bound to give it, as has heretofore been done, a liberal construction for the attainment of so important and valuable an object." This construction of this provision has been adopted by the Supreme Court of Pennsylvania and applied for the protection of the citizen in the case of Hammett *vs.* the city of Philadelphia, 15 P. F. Smith, 154.

The Supreme Court of Kentucky applied this construction in the case of the city of Covington *vs.* Southgate, 15 B. Monroe, 494. The facts in this case are almost identical with the facts now before the Court. " This was an action brought by Southgate to recover from the city of Covington $676, assessed under an ordinance of the city and paid by him as tax for the year 1852, upon 167 acres of land, of which he is the owner and which was included within the boundaries of the

city without his consent by an Act of the Legislature, passed in 1852. The tax having been assessed was paid to the city treasurer under protest, and with reservation to test the legality by a suit to recover it back."

"The plaintiff alleged that his land had been and is appropriated to fields, pasture land and wood land; that there is much vacant land between it and the populous parts of the city; that but few houses are near it, and that it is not necessary for any purposes of the city; that he has not laid it off into lots, and does not desire to do so, but wishes it to remain, as heretofore, in fields, pasture land and wood land." * * *

"The city, by its answer, puts most of these allegations in issue, and alleges that the town has extended, with houses and inhabitants, on two sides of the plaintiff's land; that there are many houses near it and streets leading towards in different directions; that it is needed for affording a passage from one portion of the city to another, and that it is worth $3,000 per acre, as city property, &c."

"It appears from the evidence that there are but few houses and many vacant lots in that portion of the city which adjoins and is near the plaintiff's land, upon which there are neither lots, nor, so far as it is included within the extended boundary, are there any buildings for residences, and although it might be convenient to a portion of the city to have a passage over his land, it does not appear that even for that purpose it was necessary to include any large portion of it." * * *

"It appears from the plat or map of the city, which forms a part of the evidence in the case, that the land of Southgate, included in extension, adjoins the former boundary for a considerable distance, but runs out a greater distance between lines which approach each other, so as to leave but a short line between them when they reach the extended or new boundary. There is, however, on the eastern side of it a large body of land, apparently several hundred acres, included in the extension and reaching the Licking river, on which, at a considerable distance from the former boundary, and also from Southgate's land, there are several blocks of lots, with streets, &c., covering a small plat of ground, containing, as we understand, some inhabitants, and which, we also understand, has

been laid off into lots since the extension—it is this detached portion of the town or city which, as we understand, requires a passway for a convenient acess to the city. There are other modes for getting this passway if it be necessary, than by imposing upon a single individual so heavy an annual burden as that from which he is now seeking to be relieved, and we concur in what we suppose to have been the opinion of the Circuit Court, that there was no legitimate necessity of the city which required that this large portion of Southgate's land should at the date of the Act which the city procured, without and against his consent, or should even at this time be included within its boundary. There is little reason to apprehend that when the city actually grows up to the land now in question, the proprietor, whoever he may be, will withhold it from the necessities of a growing population. Even if the land of Southgate be lawfully within the city, it cannot be coercively appropriated for streets, without that compensation which the Constitution secures for private property taken for public use. And there is certainly no power to take any part of it for buildings or other private uses, but by contract with him. *Then the only apparent purpose to be effected by including his land within the city against his consent, is that of subjecting it to taxation for the benefit of the city, and without any advantage to him.* If he owns other property, or has a place of business within the city, he doubtless bears therefor the appropriate common burdens, for which others under like circumstance are subject. And although the taking of his land into the city will make its boundary on that side more regular, this is but an imaginary necessity, involving in this case no actual requirement of convenience or even of seemliness. * * * Besides the irregularity in the new boundary, if Southgate's land be excluded, is produced by including the adjacent vacant land in the boundary as extended by the act in question, and as this adjacent land was included by the procurement of the city, and, as may be presumed, with the consent of the owners, but without the co-operation of Southgate. The question, even if a straight boundary were a necessity instead of a mere convenience or beauty, would still be whether Southgate should be compelled to subject his land to taxation on account of a

necessity produced by others, against his consent, and for their own exclusive benefit; this would be to subject his interest and property to the control of others, and to heavy burdens imposed at their will and for their advantage, without there being on his part any co-operation or combination with them, and without any act done by him from which it might be inferred that he either had consented or was under obligation to consent to such control and subjection, unless it be found (which it cannot be) in the fact that he had before, perhaps long before, acquired and still holds land which other parties now desire to control, and deem to be convenient, or by their own acts have made necessary, for their own purposes. Such is not the tenure of property as secured by our Constitution and laws."

As Southgate has made no town upon his land, and desires none; as there appears to have been no legitimate necessity which might jusity the extension of the boundary so as to include it within the city against his consent, and as the obvious effect and probable purpose on the part of the city, was to subject it to taxation for her own exclusive benefit, it would seem that if there can be a case of taking private property for public use in the form of taxation, under color of an extensirn of the boundaries of a town or city, and without making compensation therefor, this must be regarded as one. That there may be such a case, is plainly admitted and clearly shown in the opinion of this Court rendered in the case of Cheaney vs. Hooser, 9 B. Monroe, 344 *and* 345. And in the case last cited, one of the instances cited as an example of such a case, *is where it is palpable that persons or property are subjected to a local burden for the benefit of others, or for purposes in which they have no interest,* and to which, therefore, they are not justly bound to contribute.

The case before us presents, as we think, the essential features of the case just stated, and as the legislative establishment or declaration of the extended boundary having been procured by the city, may be regarded at her act, though under the legislative sanction, of which she has taken, or attempted to take, benefit, by the tax imposed on Southgate's land, we think is a case of taking private property for public use under form of taxation, and that it is within the prohibitory clause of the Constitution, and therefore unconstitutional and void. It follows that the assessment of this land for taxa-

tion by the city was without authority, and that she has no right to the money paid and received as tax under said assessment.

But it is the tax and not the boundary which is unconstitutional, and the city may still regard the land now in question as within her boundary, but subject to no other burdens than other lands not within her boundary, until some portion of it shall be appropriated for lots or buildings, indicating that it is used as a part of the city, when she may lawfully exercise the power of taxation with respect to such portion. And such, perhaps, should be regarded as the real intention of the Legislature, unless the contrary be plainly manifested in the enactment of statute, by which the limits of a town or city are extended so as to embrace, without the consent of the owners, large tracts of land either entirely vacant or occupied as farms and for agricultural purposes. Be this as it may, the mere extension of boundary without the extension of municipal authority of taxation, is not in itself detrimental, and is not prohibited by the Constitution. But taxation exercised under color of an unnecessary and unreasonable extension, procured by the party to be benefited, and against or without the consent of those who are to be taxed, is an oppression, against which the Constitution affords a protection to the individual which the Courts are bound to enforce, and which they will the more readily enforce, because such an extension, with its consequences, may be presumed not to have called forth the vigilance or scrutiny of the legislative body, nor to demonstrate its deliberate judgment and discretion.

The same construction of this provision was applied in the case of the Cypress Pond Draining Company *vs.* Hooper, *et al.*, 2 Metcalfe, 350.

The said company was incorporated for the purpose of draining a certain section of land, described by meets and bounds in the Act; with full power to levy a tax, per acre, on the land included within said boundary each year, for ten years, until the expense of draining shall be paid. The apellees, Hooper, *et al.*, thirty-four in number, owned 5,975 acres included in said Act. They alleged that they had no agency in procuring said Act, and gave no assent to its provisions,

and a very small portion of their lands would be improved value by the proposed drainage, and resisted the collection of the tax on the ground that it was taking their property for the benefit of others, without compensation, and for purposes in which they had very little if any interest, and that the said lands to be drained, had been of no detriment or disadvantage to them.

"This was a private corporation. Its objects and purposes do not partake of a public nature, but are confined exclusively to the interests of the persons subjected to its operation. In this case the Legislature passed upon the facts, and determined upon what lands should be taxed and the extent, and authorized the assessment. Says the Court: 'Upon the case thus presented, is the Act of incorporation, the enforcement of which is sought to be resisted by the appellees, obligatory and binding upon them?'"

"The constitutional power of the Legislature to impose local taxation for the accomplishment of local purposes, is too well settled to admit of question at this day. The principle has also been repeatedly recognized by the adjudications of this Court, that an enactment premptorily ordering the imposition of such local burthen, would not depend for its validity upon the question whether it had been passed upon the petition of a majority, or less than a majority, of the citizens to be affected by it, or without a petition from any, or merely upon the general knowledge of the Legislature. The power and discretion of the Legislature in the matter of local taxation is not, however, unlimited. Ample protection to the citizen against the oppression which might result from the arbitrary exercise of this power, is secured in the clause of the Constitution which prohibits any man's property from being taken or applied to public use without just compensation made. This has been justly characterized as the great conservative principle of the Constitution for the protection of the rights of private property from violation under public authority. And hence, whatever indisposition this Court might feel generally, to declare that, in any case, the legislative department had abused its discretion or transcended its powers, yet it has never hesitated to apply this constitutional

restriction to those cases in which it has been made to appear that it has been disregarded by the law-making power.

"That the record before us presents a case which comes within the principle laid down in the cases cited, we are perfectly satisfied. It is clear upon the facts established by the proof that the operation and effect of the Act incorporting this company, whatever may have been the object of those who procured its passage, is to appropriate the property of the appellees without their consent to the use of other individuals merely; that a burthen has been imposed upon the appellees without any view to their interest in the objects to be accomplished by it; that it is a case of palpable and flagrant inequality in the burthen as imposed upon the persons and property included within the corporate boundary, and that the appellees are subjected to a local burthen for the private benefit of others, and for purposes in which they have no appreciable interest, and to which they are not, therefore, justly bound to contribute."

These cases, Cheaney *vs.* Hooser, and Southgate *vs.* city of Covington, *supra*, have been considered as determining the construction of the constitutional provision in Kentucky, and have been adopted and applied in the following cases:

Sharp *vs.* Donovan, 17 B. Monroe, 223.

Walters *vs.* Shields, 8 Metc., 553.

Arbeguest *vs.* Louisville, 2 Bush., 271.

Swift *vs.* Newport, 7 Bush., 37.

Henderson *vs.* Lambert, 8 Bush., 609.

And adopted and applied by the Supreme Court of Pennsylvania in the case of Hammett *vs.* city of Philadelphia, 15 P. F. Smith, 153 and 154.

The nature of the burthen and the facts in the case just cited are not half as oppressive nor half so strong as the case of complainant Kelly. We do not believe that a case can be found in any of the books which presents such a monstrous oppression and wrong as in the case now before this Court.

We now invite the attention of the Court to the construction and application of this same provision by the Supreme Court of Iowa, in the case of Morford *vs.* Unger, 8 Iowa, page 85, Stockton, J.:

"The only question to be considered in this case is whether the Act of the Legislature of Iowa, approved July 14th, 1856, entitled an Act to amend the Act to incorporate the city of Muscatine," is constitutional. By this Act it is conceded that the limits of the city of Muscatine were extended about one mile on the East, and about two miles on the North and West beyond its former boundary. The plaintiff lives upon the territory brought into the city by the Act aforesaid, upon land used exclusively for farming purposes, about one mile from the old city limits, and about the same distance from any lands laid out into city or town lots or used as city property. His lands, so used, were taxed by the city at the sum of one dollar per acre. This tax he refused to pay, and his property being distrained for the payment thereof, he brought this action of replevin to test the constitutionality of the Act extending the limits of the city. * * * It is argued by the plaintiff that the extension of the limits of the city, so as to include adjacent lands without the consent of the owners, and the subjection of the same to the authority and taxing power of the city, is, in effect, taking private property for public use without just compensation.

It has been held in numerous instances, and the doctrine can now hardly be seriously questioned, that with respect to municipal corporations which exist only for public purposes, the Legislature, under proper limitations, may change, modify, enlarge, restrain or destroy them, securing the property of the corporation to the use of those for whom it was purchased. * * * The municipal corporation is the mere creature of the law. The town itself, in its material constituents, is the result of the voluntary act of the inhabitants. When there is a town or city *de facto*, there can be no question of the power of the Legislature to provide for it a local government, and to authorize local taxation for its support. The greater burden of taxation is compensated for in the greater advantages conferred by the municipal government. The consent of every individual to the authority of the local government is not deemed requisite in order to subject him or his property to its jurisdiction, or is implied in the fact of his placing himself in a condition to require such local government. If the Legis-

lature, independent of the question of taxation, may rightfully impose the authority of local government on persons who by building in close proximity may have made a town *de facto*, it would seem hardly reasonable that the expense of such government should be borne by the county and State; and as little reason can exist why the Legislature may not require the local population to support, by local taxation, the government provided for it.

All taxation may be said to involve the taking of private property for public use, and yet all property is held subject to the right of taxation by the Legislature, or under its authority, either for general purposes or in local subdivision for local purposes. It has even been held that the Legislature may, by general enactment, tax any given species of property, either private or corporate, to the value of the property itself, for that the power of taxation, whenever conceded to the Legislature over any given subject, implies even the power of destruction. McCullogh *vs.* Maryland, 4 Wheat, 415.

Legitimate taxation, whether under the State or the municipal authority, is not the taking of private property for public use without compensation within the meaning of the Constitution. The protection afforded to the citizen by the government is usually conceded to be the just compensation referred to by the Constitution, for all private property he is required to surrender to the public use in shape of taxes, and it is only when an undue proportion of the burden of taxation is laid upon him, or when the power of local taxation is made to operate upon those who, being out of the reach of the local benefits, outght not to be subject to the local tax, that there can be any plausible ground for alleging that property taken for taxes authorized by law, is taken without just compensation.

The question where the proper line is to be drawn between the legitimate exercise of the taxing power and an arbitrary appropriation of the property of an individual under the mask of this power, is discussed at length by Marshall, C. J., in Cheaney *vs.* Hooser, 9 B. Monroe, 330, (and we might say by Justice Sharswood, in the case of Hammett *vs.* Philadelphia, 15 P. F. Smith, 153 and 154,) and it is held by the Court that when there is no other constitutional restriction upon the

power of taxation, securing equality and uniformity in the distribution of taxation, either general or local, the provision of the Constitution which prohibits the taking of private property for public use without just compensation, furnishes the only available safeguard against legislation which, in its operation, may result in the appropriation of the property of one for the benefit of many.

Conceding to the General Assembly a wide range of discrecretion as to the object of taxation, the kind of property to be made liable, and the extent of territory within which the local tax may operate, it is argued in the opinion referred to, that there must be some limit to this legislative discretion, which, in the absence of any other criterion, is held to consist in the discrimination to be made between what may reasonably be deemed a tax, for which just compensation is provided in the objects to which it is to be devoted, and that which is palpably not a tax, but which, under the form of a tax, is the taking of private property for public use without just compensation.

If there be such a flagrant and palpable departure from equity in the burden imposed; if it be imposed for the benefit of others, or for purposes in which those objecting have no interest, and are, therefore, not bound to contribute, it is no matter in what form the power is exercised, whether in the unequal levy of the tax, or in the regulation of the boundaries of the local government, which results in subjecting the party unjustly to local taxes, it must be regarded as coming within the prohibition of the Constitution designed to protect private rights against aggression, however made and whether under the color of recognized power or not.

It is urged by the plaintiff that this farm, which is sought to be brought within the jurisdiction of the city, is agricultural and that it is one mile from the old boundary, and the same distance from any land laid out in lots or used or needed for city purposes; that he can derive no benefit from the extension of the municipal government over him and his property, and that the Act subjecting him to taxation at the will of the city Council, and for its benefit, is an appropriation of his private property for the use of the city without any compensation or benefit accruing to him in return.

We have no doubt, as is held in Cheaney *vs.* Hooser, *supra*, that if the owner of land adjoining a city or town should lay the same off into lots, and invite purchasers and settlers to occupy it with dwellings or otherwise, he could not object to a law extending the authority of the local government over him and his land, so laid out and occupied. But if the case is that of vacant land or a cultivated farm, occupied by the owner for agricultural purposes, and not required for either streets or houses or other purposes of a town, and solely for the purpose of increasing its revenue, it is brought within the taxing power by an enlargement of the city limits, such an Act, though on its face providing only for such extension o- the city limits, is, in reality, nothing more than authority to the city to tax the land to a certain distance outside of its limits, and is, in effect, the taking of private property without compensation. The force and effect and obvious intent of the Act is to subject such outside lands to city taxation without the pretext of extending the protection of the city over them, and when the power of the Legislature over local regulations and government furnishes no legitimate basis for the Act.

* * * * * * *

And so it is held by the Court of Appeals of Kentucky, in conformity with the principle laid down in Cheaney *vs.* Hooser, *supra*, that although the Legislature has power to extend the limits of cities and towns, and include adjacent agriculturi al lands without the consent of the owner, until it shall be laid off into lots and used as town property. The decision is made distinctly on the ground that the Act of the Legislature was an invasion of private property, contrary to the principles of our constitutional law, under the color of the power of taxation. City of Covington *vs.* Southgate, 15 B. Monroe, 489.

* * * The extension of the limits of a city or town, so as to include its actual enlargement, as manifested by houses and population, is to be deemed a legitimate exercise of legislative power. An indefinite or unreasonable extension, so as to embrace lands and farms at a distance from the local government, does not rest upon the same authority. And although it may be a delicate as well as a difficult duty for the judiciary

to interpose, we have no doubt but strictly there are limits beyond which the legislative discretion cannot go. It is not every case of injustice or oppression which may be reached, and it is not every case which will authorize a judicial tribunal to inquire into the minute operation of the laws imposing taxes or defining the boundaries of local jurisdictions. The extension of the limits of the local authority may, in some cases, be greater than is necessary to include the adjacent population or territory laid out into city lots, without a case being presented in which the Courts would be called upon to apply a nice or exact scrutiny as to its practical operation. It must be a case of flagrant injustice and palpable wrong, amounting to the taking of private property without such compensation in return as the taxpayer is at liberty to consider a fair equivalent for the tax.

In the case of the city of Covington *vs.* Southgate, 15 B. Monroe, 488, it was held by the Court that as Southgate had made no town upon his land, and desired none, and as there appeared no legitimate necessity to justify the extension of the city boundary without his consent, it presented a case of taxation for the benefit of others, and was, under color of taxation, an appropriation of private property without compensation.

We think the case made by the present plaintiff is quite as strong as the one cited. His land is situated too far from the city of Muscatine to be deemed in any just sense a part of it. He does not desire to lay it off into city lots, but desires to use it for farming land. It is idle to say that the protection afforded by the city authority, or the privilege of voting at the city elections, furnishes a just equivalent for the burdens imposed upon him in the shape of taxes by the city, and the attempt to extend its jurisdiction over him and his property, must be regarded as an attempt to take private property for public use, and within the prohibitory clause of the Constitution.

The restriction in the Fifth Section of the Act, (like that portion of Section 19 of Act of April 1st, 1868, P. L. 569, requiring real estate situate in Pitt, Oakland and Collins townships to be marked "rural," and assessed at two-thirds of the

rate of city taxation,) "that the lands lying within the territory brought within the city, not laid out into lots and outlots, shall not be assessed or taxed otherwise than by the acre, according to its value for agricultural, horticultural, mining and other purposes," does not relieve the Act of its objectionable features, or strenghten in any degree the case of the defendant. It would seem to indicate, on the other hand, that the city was seeking to bring within its power, for the purposes of taxation, land used for farming purposes, and not needed for city lots, without any expectation of rendering a just equivalent for the burdens it designed to impose. The difficulty is in no manner obviated by the suggestion that the city only proposed to tax the land of the plaintiff by the acre (in the case before the Court, two-thirds or one-half the rate of city taxation) as agricultural lands and not as city lots. It can make little difference to the plaintiff in what manner his property is taxed, whether as city lots or by the acre as agricultural lands. It is the power to tax in any shape to which he objects. It might as well be attempted to call the tax itself by some less objectionable name.

This case, like the cases of Cheaney *vs.* Hooser, and city of Covington *vs.* Southgate, *supra*, in Kentucky, has been considered as a leading case in the Courts of Iowa, and as determining proper construction and application of the constitutional provision as a safeguard and protection to the private citizen against the abuse of the legislative power of taxation by municipal authorities, and as such has been adopted and applied in the following cases:

Langworty *vs.* city of Dubuque, 13 Iowa, 86.
Fulton *vs.* city of Davenport, 17 Iowa, 404.
Deeds *vs.* Sanborn, Marshall, 26 Iowa, 419.
Buell *vs.* Ball, Marshall, 20 Iowa, 282.
O'Hare *vs.* city of Dubuque, 88 Iowa, 144.
Davis *vs.* city of Dubuque, 20 Iowa, 458.
Deiman *vs.* city of Ft. Madison, 30 Iowa, 542.
Durant *vs.* Kaufman, 34 Iowa, 192.
Mitchell *vs.* Davenport, 34 Iowa, 194.

These are the most recent cases, having been decided in 1872, in which the Court declare an adherence to the rule establish-

ed in the previous cases. C. J. Beck, in the course of his opinion, remarks: "The mere fact that lands are included within a municipal corporation does not authorize their taxation for general city purposes. Under certain conditions they are exempt therefrom. The conditions are such that the property proposed to be taxed derives no benefits from being within the city limits. This is the rule recognized by the various decisions of this Court upon the subject. To enable us correctly to apply the rule above stated, we must consider and determine the character of the benefits which will render lands within a city liable to general municipal taxation. These are not such as attach to all lands near a city or a large town whereby they are rendered more valuable, but are such as accrue to lands considered as city property. Lands lying contiguous or near to a city, though incapable of any use except for agricultural purposes, are, nevertheless, of greater value on account of their location than those more remotely situated. Convenience to market, &c., &c., adds to their value. Therefore lands within a city, kept and used alone for agricultural purposes, and not capable of being used as city property, and not demanded for that purpose, not possessing a value based upon adaptation for the purposes of dwellings or business, cannot be considered directly benefited by the fact of their being within the city limits. Such lands shall not be taxed for general municipal purposes. In determining the benefits accruing to such lands, a controlling fact to be considered is the purpose for which they are held.

"If held as city property, to be brought upon the market as such whenever they reach a value corresponding with the views of the owner, they ought to be taxed as city property. There would neither be reason nor justice in permitting the proprietor of a large tract of land within a city to hold it for an opportunity to bring it into the market as city lots, and for no other purposes, under the pretence that it is agricultural lands, thus escaping taxation for the general improvement of the city, the very thing which will bring his lands into market, and thus add greatly to their value—a direct benefit to the owner. In such a case the general improvement of the city, the building of streets near or in the direction of the

lands so held, the construction of water works, public buildings, &c., &c., by which the prosperity of the city is advanced, and an invitation to population is held out, all bestow direct benefits upon the owner of such property. The lands being a part of the city in fact, and held by their owner for the increase in value which he expects, because they are city lots, are benefited by the municipai government, and share in the benefits derived by the expenditure of the revenue raised by taxation. If property be so held within a city, whether it be subdivided into lots, and streets thereon are dedicated to public use, or be inclosed and cultivated as agricultural lands, it ought to be subject to general municipal taxation. This rule is directly deducible from the rule established by the decisions of this Court."

The Supreme Court of Iowa, reviewing the cases cited above in the case of Langworthy *vs.* the city of Dubuque, 16 Iowa, 274, say: "The prominent idea upon which each of these cases turned, was not that they were farmers and cultivated their lands in corn, potatoes, vegetables and fruit, for this is frequently done upon ground in cities, but that their lands were too remote to be needed for houses and population, and especially because they would receive no equivalent for the taxes levied and paid, in the way of protection from the local government, or other benefits from its police regulations. Hence taxation against them or their property, in such case, would be the taking of private property for public use without compensation, within the meaning of the Constitution."

The decisions of the Courts of Kentucky and Iowa, to which we have referred the Court, are not founded upon local or statutory law peculiar to those States, but rest exclusively upon a constitutional provision identical with that of the State of Pennsylvania, the construction of which, as given by the Supreme Court of Kentucky in Cheaney *vs.* Hooser, was adopted by the Supreme Court of Iowa in the case of Morford *vs.* Unger, and by the Supreme Court of Pennsylvania in the case of Hammett *vs.* the city of Philadelphia, and is to-day the law of this State. As laid down in the Washington avenue case, 19 P. F. Smith, 363, where Justice Agnew, rendering the opinion, says: "Taxation * * * must be

public in its purpose, reasonably just in its distribution, and cannot sacrifice individual right by a palpably unjust taxation. To do so is confiscation, not taxation; extortion, not assessment, and falls within the clearly implied restriction of the Bill of Rights."

The Supreme Court of Pennsylvania have held "taxation to be correlative to protection."

McKeen *vs.* the county of Northampton, 13 Wright, 524.

Pittsburgh, Ft. Wayne and Chicago Railroad Company *vs.* the Commonwealth, 16 P. F. Smith, 73.

Lewis *vs.* the county of Chester, 10 P. F. Smith, 329.

Borough of Carlisle *vs.* Marshall, 12 Casey, 402.

And defined "taxation to mean a certain mode of raising revenue for a public purpose, in which the community paying it has an interest. The right of the State to lay taxes has no greater extent than this."

Sharpless *vs.* the Mayor of Philadelphia, 9 Harris, 174, No. 19.

Hilbish *vs.* Catherman, 14 P. F. Smith, 159.

Grim *vs.* Weisenberger School District, 7 P. F. Smith, 437.

And further held that "an Act of the Legislature authorizing contributions to be levied for a mere private purpose, or for a purpose which though it be public, is one in which the people from whom they are exacted have no interest, would not be a law, but a sentence commanding the periodical payment of a certain sum by one portion or class of people to another. The power to make such order is not legislative but judicial, and was not given to the Assembly by the general grant of legislative authority."

Sharpless *vs.* the Mayor, &c., 9 Harris, 174, No. 16.

Hammett *vs.* the city of Philadelphia, 15 P. F. Smith, 152.

Grim *vs.* Weisenberger School District, 7 P. F. Smith, 437.

Washington avenue case, 19 P. F. Smith, 362.

And such attempted exercise of the taxing power beyond their limits to be in effect only a mode of taking private property for public use without making compensation, and fall within the clearly implied restriction in the Bill of Rights.

Hammett *vs.* the city of Philadelphia, 15 P. F. Smith, 146.

Weber *vs.* Reinhard, 23 P. F. Smith, 373.

Under this law, do the facts entitle the plaintiff to the relief prayed for?

ANSWER AND TESTIMONY.

The answer admits "that the land in question is used for agricultural purposes, and that it has not been laid off into lots, but that, with other lands, it was laid off into streets and avenues by Councils, by a plan in 1870; that immediately adjoining the south side of plaintiff's property squares of ground have been laid off in small lots, and dwellings and store houses erected upon them; that plaintiff's land has the advantage of Frankstown avenue, which has been graded and paved with wooden pavement to within a short distance of it; of Spencer avenue, which has been graded, and runs along a portion of the north side of said land; of streets and avenues, graded and paved, running within a short distance of three sides of complainant's land; of the city police, stationed in the immediate neighborhood; of water and gas, which run along Penn avenue and within a stone's throw of complainant's land; of the new water works, now in course of construction, and of all the benefits and protection afforded life and property by the municipal government."

The plaintiff's testimony supports all the material allegations of his bill, put in issue by the answer of the defendant. The only witness examined by defendant was City Engineer Alexander Dempster, whose evidence is to be found on pages 34 and 35 of the testimony. Mr. Dempster's evidence does not in point of fact disprove anything alleged by plaintiff, material in his case, nor in conflict with any of plaintiff's evidence, except where said Dempster deals in conjectures or gives his own opinion about questions, in regard to which he is no better informed than other men. His evidence is mainly conjectural, and establishes no important material matter set up as defense; whereas, the master's report upon the evidence cited, admits nearly all the material allegations upon which the plaintiff rests, for he says, on page 12: "Before consolidation there were two public roads though the land, one the old Frankstown road, the other the Homewood road, leading from the Frankstown road to the Greensburg and Pittsburgh turnpike, now Penn avenue, and crossing the Pennsylvania Rail-

road at or near Homewood station. After consolidation the name of the Frankstown road was changed to Frankstown avenue, and that of the Homewood road to Homewood avenue. Apart from this change of name and some surveying and marking, these two roads or avenues remain substantially in the same condition that they were in before consolidation, the work done on them yearly since that event being about the same as before, both as to kind and quality."

The master, in regard to Spencer avenue and its termination, places himself in conflict with two of the witnesses by inserting his own personal observations on the land. It would have been better for him to have omitted this, as he was not a witness, but a master, supposed impartial between the parties.

The master says further (page 13): "Mr. Kelley's land does not need, for the purposes for which it is used, water from the city works. That it is suffiiciently watered from the springs, well, &c.; that the old roads accommodate the land sufficiently for purposes for which it is used; that the fire department does not act that far out, and could not be made available there for the want of water, and that the police do not extend their visits that far out." The master thus disposes of all the material claims (except Spencer avenue) by defendant as the basis of his right to tax these lands. The defendant alleges, and swears to it, that the lands in question have all the customary municipal protection for life and property given anywhere, when it is a fact beyond dispute that protection against fire, water accommodations and protection by police regulations to life and property in cities, crowded, as they generally are, with all varieties of character, are beyond all controversy the most important charges for each. Is it possible, they never having been furnished, that defendant can continue to demand their consideration, and be sustained by any court, on the principle of common justice, putting the constitutional provision, for argument sake, altogether aside?

The defendant, in its answer, alleges that new water works are being constructed; that avenues have been located and partially improved, in the direction of the farm in question, and other municipal benefits are in contemplation, viz.: A survey and plan by Councils were made some years since,

showing where streets and city improvements in the future may benefit the farm. We submit that this is not the question, because the judgment of the Court must be based upon facts as they now exist, and not upon what the future may develop. When these contemplated improvements tending materially to the current benefits of these lands, which render them justly liable to taxation for ordinary municipal purposes —in other phraseolgy, when the city of Pittsburgh, as a city in fact, as demonstrated by houses and population, moves up to these lands, and demands them for the accommodation of her increasing population and city necessities, then the injunction against taxation now asked for, on proper application may be dissolved. The answer admits in substance that at the present time the city of Pittsburgh has no water apparatus by which these lands can be accommodated with water for protection, and holds out in prospect new water works, in process of construction, and asks the Court to justify and defend her in her enormous exactions upon assurances that she will do better in the future. Such a defense is unworthy of reply by argument. O'Hare *vs.* the city of Dubuque, 22 Iowa, 144.

The answer alleges, "that the said Kelly's lands, with the other portion of the city in that neighborhood, was laid off in streets and avenues by Councils, by plan in 1870; that immediately adjoining the south side of plaintiff's property, squares of ground have been laid off in small lots, &c. This is the small town of Homewood, laid off by Messrs. Mellon, as Judge Mellon testifies, by itself, and detached, with which the city has never had anything to do, and to which she has never extended water, gas or any other municipal facility or benefit, and for the defendant to claim the benefit thereof, only exposes the nakedness of her attempted justification in taking plaintiff's property. The acts of her Councils upon paper, and her surveys, by plats and plans for streets and avenues, only indicate what may in the future, some time, be taken for public use, but establish no present necessity or right to appropriate, assess or tax."

In the case of the District of Pittsburgh, 2 W. & S., 324, Kennedy J., says: "But the mere laying of them (streets,

lanes, alleys, &c.,) out cannot be said of itself to be a taking of the property of the individuals upon which they are laid out for public use at some future day, but rather a designation of what may be required for that purpose thereafter; so that the owners of the property may, in due time, be fully apprised of what is anticipated, and regulate the subsequent improvements which they shall make thereon accordingly.

"It is only when streets, lanes, alleys and public squares shall come to be admitted in this case into the city as a part thereof, and to be opened under the authority of the same, in the manner of the Act, that the land so appropriated can be said to be taken for public use; for until then the owners thereof continue not only to hold the same interest in them, but likewise to have the same right to enjoy and use them in the same manner that they did previously." In violation of this adjudicated principle of right to private property, the city of Pittsburgh (defendant) for years has deprived plaintiff of the entire use and banefit of his farm, and annually taken from him more than two hundred per cent. over and above the rents, profits and benefits of his entire property. The defendant has not in any manner acquired the right or dominion over the said property of the plaintiff; it never has, by her, been appropriated by public uses, and never, for one minute, has she had the right to tax it, as a municipal corporation, as a portion of property acquired by her for public or municipal purposes. Apart, therefore, from all other considerations, this want of power, this want of dominion and control, acquired by law over plaintiff's property in her capacity as a city in fact, forbids her exercising the taxing power over it, which is a local special power, to be exercised in consideration of special local benefits conferred; when, in fact and in law, she, as yet, has not acquired the right and consequent power to confer the compensatory benefits upon this property; for she cannot open and improve streets or avenues through it, until she first appropriates it, and she cannot take or appropriate it without compensation given or secured, and not then until there is a necessity for her to have the land to accommodate her increased and increasing population. The taxes, therefore, which she has been forcing out

of the same from year to year, actually consuming the property at the rate of three hundred per cent. annually beyond any profit that can be derived from it, is simply a periodical spoliation and annual sentence of condemnation; an exaction which should be called by its proper name, a municipal robbery, for she does it by force and with strong hands.

This question decides the whole case, for unless defendant can show that she has legal dominion over the property and the right to dedicate it to public purposes, first having made or secured compensation or rendered consideration for burthens imposed, she is a tresspasser from the beginning.

THE MASTER'S REPORT.

The Honorable Court of Common Pleas below did not see proper to render any decree, simply overruled exceptions to Master's Report, consequently the master was the judge in the case, and his report is presumed to speak for the Court. Our exceptions to said report are all well taken. The master should have found directly and positively that the allegations of the bill, admitted by the answer and proved by the evidence, were true; instead of attempting to qualify them, and mitigating the conduct of defendant, when he recited the admission of the defendant, that the property was not accommodated with water by the defendant, he volunteers an apology for the city, by saying, "the property does not require for its present purposes water facilities." This question was not submitted to him, and in this manner he accompanies all his report of facts with matters with which they have nothing to do; all tending to the prejudice of the plaintiff's cause. In this respect his whole report is very objectionable.

Second. The plaintiff in his bill denies that the defendant, in forcing these exactions from his property, is exercising any taxing power whatever, but is outside of all legitimate taxing authority conferred upon her; that her conduct and acts are illegal and in violation of complainant's constitutional rights. The master could not help knowing that this was the issue, yet by a labored effort he has tried to evade it, and directed the attention of the Court to a question we never presented, (unless as inducement, not capable of an issue,) viz.: the regulating of assessments, the inequalities of taxation, and the numerous authories cited thereon. To all this portion of the report plaintiff excepts, as having no bearing ont he issue, but tending to encumber the record and embarrass the case, and should have been stricken out.

Third. The admissions of the answer and the evidence in the case having shown beyond all controversy that the defendant did not extend to this property the considerations, (to wit, protection and an interest in the objects to which the revenue collected from them is applied,) which the Courts

have always held to be the essential requisites to justify the exercise of the power of taxation for either general or local purposes, but especially the exercise of the power by a limited body corporate, restricted by the wants of its very nature as a town or city in fact, or a dense population, bounded by the limits to which its corporate protection and benefits extended to; the master should have found these facts simply, and then drawn the conclusion himself, or left it for the Court to draw, that under this state of facts plaintiff was not liable to taxation for municipal purposes, and therefore entitled to relief from five special items of city taxation wrongfully imposed upon farm lands, never, either by defendant or plaintiff, in any way appropriated to city purposes. Instead of this plain official duty, the master in his report gives a labored argument to prove what nobody has disputed for a thousand years; that taxation is a sovereign power, legislative and not judicial, and then incorporates in his report numerous decisions about the rule of taxation, to wit: commercial and not productive value being the basis of estimated valuation. So far as the merits of the issue in the case are concerned, he might just as well have embodied in his report Leviticus and Numbers.

Fourth. The fourth exception explains itself, and the portion of the master's report to which it refers, on page, is fatally erroneous in its statements and conclusions. He says by the Act of Consolidation the city got the power to assess and collect taxes, and no power to do so was left anywhere else. Here the master assumes the very thing that is disputed. The mere extension of territorial boundaries being a legislative act, is detrimental to no person, and, *per se*, carries with it no power to tax. Its chief purpose is to fix the limits of the special jurisdiction given to the corporation or city. This can be done with or without the consent of the inhabitants. The Legislature can extend the city limits of Pittsburgh to Greensburg, but will any person say that such extension confers the right to tax for city purposes the included property, and why? Because there is no city in fact demonstrated by houses and population, requiring the increased territory; there is no dense population requiring a more stringent government

and additional governmental functions, such as a standing police body, for the protection of life and property; a fire department, with water department to co-operate, to protect life and property from destruction by conflagration; a sanitary department and other city conveniences, such as lighting, paving and cleaning streets. Until there may be such dense population and such demand for increased territory, a town or city can neither, as such, tax or demand any man's property. This is a limitation on the right to tax, which springs from the nature of the body authorized to impose it, to wit.' density of population; and, therefore, the master entirely mistakes the distinction between the general taxing power, exercised by the State to the full extent of her limits, to which she extends protection and benefits, and the taxing power of a city, town or corporation, acting under the power given by the Legislature, empowered to impose additional burthens by taxation, which additional burthens rest upon commensurate additional benefits conferred; whereupon, as before remarked, when the city of Pittsburgh moves up to plaintiff's land as a city in fact, carrying her necessary benefits and improvement with her, she can tax and appropriate his lands by law; but she cannot reach out and tax them in advance on future promises or assurances possibly delusive. And this distinction the master does not seem to have comprehended.

He remarks again: "What I have said of taxes for streets, roads or highways, may be said with equal propriety of school taxes, &c." We laid the authority before him, to wit: "That it does not follow that persons or property exempt from city taxation, will also be exempt from taxation for school purposes. The tax is levied and collected by the municipal authorities because they are *ex-officio* common school officers for this particular district. The tax itself is a common school, and not a municipal assessment in any sense."

City of Henderson *vs.* Lambert, 8 Bush., 610.

And, therefore, the master should have found that the said farm was subject to taxation only for such purposes as the same was subject to without the city boundaries, and that by the Act of Consolidation the municipal authorities became and were *ex-officio* authorized to collect and disburse the same.

On the last page of his report the master admits, if the law was the same as in Kentucky, Mr. Kelly would be entitled to relief, but he thinks the law is different in Pennsylvania. It would have been worthy of the zeal and attention of the master, as both laws were presented to him, to have pointed out where this difference consists, instead of determining the case against the plaintiff upon a mere assumption. The two constitutional provisions have already been brought to the attention of the Court, and if by any rule of construction a material difference should be found to exist, it has escaped our attention. The master misapplied the rule adopted by the Supreme Court of Iowa, in the case of Mitchel *vs.* Davenport, 34 Iowa, 192; because all the evidence in the case shows that plaintiff asks no increase in value; that he expects none; but holds his lands as farm and grazing lands exclusively, and the very case cited by the master says that the purpose for which the lands are held is a strong conclusion against the taxing of them; on page 27 the master says: "The property holders must relieve themselves by applying their property to such use as will bring its productive and market value into a fair proportion." Four witnesses or more testified before the master, and their evidence is to be found on pages , , , , , and of printed testimony, "that, in their opinion, there is no use to which the property could he applied by which the profits therefrom could be increased."

The master further labors to ascertain the amount of benefit that would be required to justify the levying of tax; makes an imaginary case, and then cites authority and argues to overcome it; when, in fact, five or more of the witnesses testify that no benefits whatever have been conferred upon the land, but that it has been positively injured and depreciated by the action of the city; and that, at the present time, the said property has, by the ruinous action of the city, been so placed that the owner can neither retain it, nor rent or sell it, for no man would take it and pay the taxes, or half of them, for the property. Why the master withheld all these important facts from the Court, we leave with himself to explain. This evidence is to be found on pages , and , printed evidence. Mr. Clark, on page , testifies, "that Spencer avenue stops at

Spencer's property. It has no other connection. There is no road open to this avenue; that it is a positive damage to the land of Mr. Kelly." The master replies to this evidence as follows: "I myself saw, upon going upon the ground, that there is a road through Mr. Kelly's land to Frankstown avenue, a little east of the public road." The master was not a witness; he was not sworn as such; and while we do not withhold from him any presumption in favor of his sincerity and veracity, still this was not the kind of facts he was expected, reasonably expected, to report, nor was it fair to the plaintiff to cut him off from his right of cross-examination.

We now direct the attention of the Court to what we regard as the fundamental error and insuperable objection to the report on the chief principle of the bill, on pages , , and , he argues and cites numerous cases to show that where the right to tax exists, the Courts cannot interpose to correct hardships, irregularities, &c., resulting from errors of discretion on the part of officers entrusted by law with such discretion. We never asked for the interposition of the Courts for such a purpose, and if the master had properly comprehended the legal effect of one of the cases he cited, it would have saved him his voluntary, but misapplied zeal and labor. In the case of Philadelphia Association *vs.* Woods, 3 Wright, 381, Chief Justice Lowrie, speaking of the matter then before the Court, says: "If this is tax alone, we do not see how we can pronounce it unconstitutional merely on the ground of irregularity, for this is unavoidable." This is the very question presented by the plaintiff from first to last. That it is not taxation at all that the city of Pittsburgh is exereising over the land in question; that not one of the legal considerations that justify her in her conduct will apply, (all of which we have herein before cited) wherefore the master ran into this long discussion of questions not before him, and in his admiration of his argument, congratulated the Court on its being relieved from the examination of individual assessments, &c., &c., is beyond our comprehension; for, admitting all the master has said, and all the hardship he has pictured (and he has greatly magnified them) in the application of

law, all his logic is silenced, and all his argument answered, by one or two simple questions.

Are not Mr. Kelly's lands agricultural and farm lands yet?

Has the city of Pittsburgh legally appropriated them and taken them from the owner?

Has she made or secured compensation?

Does her wants as a city require them?

Has she extended benefit and protection in consideration of the exactions she has forced from them?

What consideration, in any shape, has she given for the thousands she has taken? None at all?

Is the plaintiff directly benefited in his property by the action of the city? No; the evidence greatly preponderates in weight in showing that said property is damaged and not benefited; then, what do you do with the law?

Owing to an imaginary difficulty to be encountered in the application of the remedy for the relief of plaintiff, the master goes into an elaborate argument for the purpose of entirely destroying the conservative principle of the Constitution. He might, from the insensibility that he exhibits in regard to this provision of the Constitution as an element of protection for the rights of the citizen, have abridged his labor, by saying at once that the provision of law which forbids private property from being applied to public use, without compensation, is a mere *ignis fatuus*; a shadow, and not a substance; words, but having no practical meaning on the important question of law hereinbefore cited, as the basis of taxation in this State, to wit: "That taxation and protection are correlatives, and that assessments on property peculiarly benefited by local improvements, and in consideration of such benefits, are constitutional;—thus far have the judicial decisions in this and other States gone, and no further." Upon this question the master never seems to have spent a thought. Now, what does the law mean by protection? Simply "the benefit or safety which the government affords to the citizen —a privilege granted by the government to a party to an action, by which he is protected from a judgment which would otherwise be rendered against him." Want of consideration is legal protection in the Courts of all civilized coun-

tries. Still, while the master is forced to concede that the lands are agricultural; never taken by the city for city purposes, not wanted by the city, and if checkered by streets and avenues and all paved, would and could not be used as a city for the want of population; when the owner has not appropriated them to any except farm uses, and wishes so to retain them, and when positively no city benefit nor city protection has been extended to them, still, as we understand the master, he justifies the defendant in seizing this property and applying it to the benefit of others, at the rate of about $2,600 per year, and can see nothing contrary to law in it, which says no man's private property shall be taken from him by the government without condemnation and compensation for it. In the light of these plain questions, all the master's verbose and lengthy report vanishes into myth, leaving nothing but an example of legally fallacious disputation and error. No person knew better than the master that it was not an exercise of the legitimate taxing power, but taking private property for the benefit of others under the pretense of the taxing power, that we complained of; therefore the zeal with which he labors to subvert, destroy and wipe out the protective provision of the Constitution, dear to every man or citizen in the Commonwealth, and which, we trust, will never be surrendered at the dictation or province of any individual or corporation, is a matter of sincere regret for the master himself rather than censure. When the English Parliament ordained that all power to tax the citizen, or impose burthens on him, rested in the law-making power, and divested the King of all authority to exact or require money or property from the subject, all the superior judges of England, the historian informs us, united and gave to the King their written opinion that, notwithstanding the Act of Parliament to the contrary, under certain emergencies, in the discretion of the King, he could levy contributions from the people for the use of the government. The master seems to have acted in like manner throughout all his lengthy discussion, that, no matter what the Constitution may say, the city of Pittsburgh, in her discretion, having, by her own act, extended her boundaries over plaintiff's property, shall still have the right to confiscate,

by her municipal impositions and, under color of taxation, to take all the property in question for the benefit and protection of her own city purposes, the complaints to the contrary nothwithstanding. John Hampden, in opposing the advice of the judges of England, and defending the rights of the citizen, earned a reputation that will never cease to be admired while liberty survives and patriotism has a friend.

In Dr. Bowman's case, when the English Parliament took his freehold from him and gave it to another, Lord Cooke, when he was appealed to, said the common law doth restrain Acts of Parliament when they are in violation of common right and common justice. We want more of the spirit of Hampden and Cooke in the present times, when the overshadowing influences of powerful corporations are causing our rights to tremble in the scales, and our Courts and masters are in danger of yielding to them a too ready obedience. Fortunately for the private citizen, the spirit of Lord Cooke survives, for the Supreme Court of Pennsylvania, in Rutherford's case, 22 P. F. Smith, 85: "It is not competent for the Legislature to impose unjust, arbitrary and grossly unequal burthens upon individuals, even for a public purpose; and it is less so, when the purpose is private, and the proceeding not in due course of law."

The master, in his report, says: "Mr. Kelly's case is doubtless a hard one, as is that of his neighbors in like condition, but I think the Courts have not power to relieve him. The Legislature alone, I think, has the power to do it." We do not complain of the Act of the Legislature, interpreted by the authorities which we have before cited. The mere extension of territorial boundaries is not, *per se*, detrimental to us—it imposes no burthens. We admit this right in the Legislature, and by exercise of it to constitute a town or city in law; but that, *per se*, gives no right to tax for municipal purposes. The power of taxation, as held by the Legislature, being subject to limitations, as shown by the authorities heretofore cited, can only be delegated to the city of Pittsburgh subject to these limitations, and such we conceive to have been the intention of the Legislature in the Act of Assembly of April 6th, 1867, P. L. 565. To this extent the Act was constitutional, and a

legitimate exercise of the legislative power. The question presented in this case is: Whether the city of Pittsburgh has respected these limitations? We insist that the facts show that she has not, and that, in exceeding them, she is acting illegally, and outside of any authority delegated to her by the Legislature. The power of the city to levy and collect from these lands taxes for municipal purposes is the disputed right, the determination of which is judicial and not legislative. "Legislation gives us the standards of weight, measure and value; but it weighs measures, and values nothing. And so with custom and usage; it gives us the rule or standard of civil conduct and civil rights, but it never judges under the rule, or applies its standards to any given case. It gives the rules and implements of justice, but use none of them. It hears no parties, just because it has no particular case before it. Jurisdiction is always engaged in applying the standards of right to particular cases of disputed right, and therefore always deals with parties, and therefore always hears them." Baggs' Appeal, 7 Wright, 516.

"But taxation exercised under color of an unnecessary and unreasonable extension, procured by the party to be benefited, and against or without the consent of those who are to be taxed, is an oppression against which the Constitution affords a protection to the individual which the Courts are bound to enforce, and which they will the more readily enforce, because such an extension, with its consequences, may be presumed not to have called forth the vigilance or scrutiny of the legislative body, nor to demonstrate its deliberate judgment and discretion." City of Covington *vs.* Southgate, 9 B. Monroe, 499.

The distinction, as matter of law, between the town or village proper, and the agricultural land adjoining was recognized by the Supreme Court of Pennsylvania, in the case of the borough of Little Meadows, 11 Casey, 336, where Lowrie, C. J., says: "The fundamental mistake consists in supposing that any more than the village proper, with its proper territory, can be incorporated. All this land is not a village. We can declare this as a matter of law, just as well as we can say, as a matter of law, that a river is not a lake, or a township is

not a county; for it is merely declaring the meaning of words in a law."

"And it is quite unjust to give a village such an extension, for this puts all the farm lands around it in the power of the real villagers, to tax them as they please, and expend all the tax for themselves. Experience does not justify us in presuming that such power would be justly exercised, when it can be exercised selfishly."

The restriction in the 19th Section of the Act of April 1st, 1868, P. L. 565, "and all real estate situated within the districts of Oakland, Pitt, Peebles, Liberty and Collins townships shall be marked 'rural,' and there shall be assessed and collected thereon two-thirds of the rate of city taxation that may be assessed and collected upon other real estate within said city," does not relieve the Act of its objectionable features or strengthen in any degree the case of the defendant. It would seem to indicate, on the other hand, that the city was seeking to bring within its power, for the purposes of taxation, lands used for farming purposes and not needed for city lots, without any expectation of rendering a just equivalent for the burdens it designed to impose.

The difficulty is in no manner obviated by the suggestion that the city only proposes to tax the land of the plaintiff "two-thirds of the rate of the real estate within the city proper," and not as city lots. It can make little difference to the plaintiff in what manner his property is taxed, whether as city lots or by the acre as agricultural land. It is the power to tax in any shape to which he objects. It might as well be attempted to call the tax itself by some less objectionable name." Morford *vs.* Unger, 8 Iowa, 96.

The attention of the Court is earnestly requested to an exination of this case, and to the distinction so well drawn by the Supreme Court of Nebraska in Bradshaw *vs.* Omaha, 1 Neb., 16.

"The case before us presents the question of the power of the Legislature to authorize a municipality to tax for its purposes any and all property, whether justly within its territorial limits or not; which is very different from the question of such power when exerted by the State for State or general pur-

poses. The relation of the citizen to the State, and to a particular city, are very different."

"Of the former, he is a member both rightfully and legally. He owes to it certain high and sacred duties, not the least of which is contributing to its support. Of the latter he may not be a member; he may owe it no duties; he may derive from it no benefits."

"In a word, a city's taxes are for local, a State's for general purposes. Of the one, a man may or may not be, of the other, he must be a member. The improvements of one may or may not; those of the other must measurably benefit him."

"Extreme cases may be stated on the one hand and on the other. * * * But it is not the duty of the Courts to lay down exact rules to which every case must be brought. It never attempts to lay down more than general rules, which are flexible in their just application to particular cases."

"The distinction which is pointed out above applies to the power or propriety of the Court interfering with what the counsel call 'legislative discretion,' when conferring taxing power for the benefit of the State, and when conferring them for the benefit of a city. In the former case, in almost every instance, the exercise of the taxing power is political, but in the latter it is purely administrative in almost every instance. * * * The fallacy of the argument of the learned counsel for the city consists in laying down what he deems just considerations as to the jurisdiction of the Court, and then applying them to an entirely different subject of municipal taxation."

"The question is then narrowed down to this: Can a Legislature authorize a city to tax for its support, lands not reasonably to be considered city property?"

ARGUMENT OF COUNSEL FOR DEFENDANT IN ERROR AND MAJORITY OPINION OF COURT BELOW.

In response to the position taken by counsel for defendant in error in the lower Court and the opinion of the State Court that, "for the purpose of carrying out the details of government, the prerogatives of the Legislature to create, enlarge or diminish such corporations is indisputable." If by this is meant merely territorial boundaries, in our argument in chief we admitted this, and cited high authority to sustain it. The conclusion drawn from this admitted power of the Legislature, was adroitly put by the counsel in the following manner, to wit: "The power in the Legislature to create or enlarge municipal corporations must of necessity embrace the power to direct the raising of a revenue in the form of taxation to meet the ordinary expenses of maintaining it." Now, what was this intended to convey? Almost anything except to hold the counsel to one of the essential principles involved in this controversy. You must give this paragraph such a construction as will make it present the principle or question intended, and applicable to the case before this Court. The intention of this paragraph is, concisely speaking, to affirm the proposition that the mere extension of corporate territorial boundaries, by the Legislature, necessarily embrace and carry with it the power to impose local municipal assessments, the power to levy municipal taxes and to raise municipal revenue, and when within the territorial limits of the corporation, for any and all purposes, without restriction or limitation, and that any denial or restriction of this right, no matter for what object or purpose, is a limitation of the taxing powers. If the paragraph does not mean this, so far as the case before the Court is concerned, it means nothing. This question disposed of, and the argument is answered. The levying of local municipal assessments for local objects and purposes, is not a necessary adjunct of the taxing power at all. The taxing power lives and is complete without it, and it does not grow out of the taxing power, but results from the action of the individual inhabitants, who, by electing to live in close proximity, constitute a town in fact,

which no legislative body can do. Electing to live in such compact community, and thus constituting a city or town in fact, as demonstrated by houses and population, experience has demonstrated the necessity of additional rules of government, additional institutions and wants; and from these spring of necessity municipal taxes for the local objects and purposes of such local community. The proper governmental taxing power is untouched by these local wants and local laws. They result not from the ordinary but extraordinary demands of civilization, and they come not from the necessities but the luxuries of our race; not from the natural but artificial wants of mankind. It is from the seeming determination of the Court and counsel to confound the taxing power proper with these artificial local regulations, that presents the trouble in this case. They seem to be unwilling to notice the distinction found in all the Books, and so necessary to leave the tribunals free to administer justice. This distinction is well drawn in Hilliard's Law of Taxation, page 364, sections 27, 28, 30; 21 A. R., 40; 19 Mich. 39; 20 Iowa, 396; Fairchild *vs.* Ratcliff; Hammett *vs.* Philadelphia, 65 Penn., 146.

Without intending to speak dogmatically, but that we may be clearly understood, we directly deny the assumed legal proposition, that the mere extension of corporate territorial boundaries carries with it, *per se*, the right and power to tax for all municipal purposes, and that other causes, other objects, and other inherent local circumstances not only give the right but control it.

Seely *vs.* City of Pittsburgh, 1 Norris, 360.
Hammett *vs.* Philadelphia, 15 P. F. Smith, 146.
Washington avenue, 19 A. D., 352.
Cooley on Taxation, 104 *et seq.*
Cheaney *vs.* Hooser, 9 B. Monroe, 344 & 5.
Southgate *vs.* City of Covington, 15 B. Monroe, 494.
Morford *vs.* Unger, 8 Iowa, 85.

Again, the counsel for the defendant in error puts his case in this wise, and asks "whether the Legislature authorizing the city of Pittsburgh to levy and collect taxes for the purpose of providing the means of running the city government, is to be revised by the Courts under a pretense by a tax-payer,

that such legislation is in contravention of a constitutional limitation." This seems to be an extremely disingenious statement of the case. Here the obvious and necessary distinction between local municipal assessments and taxation are again confounded. The gravamen, the grievance complained of, is not presented at all; but a proposition is presented well calculated to mislead the Court. The plaintiff in error is not complaining of general taxes. He pays these in common with other citizens. He complains of special local municipal assessments imposed on his farm, over which the city of Pittsburgh has no right to exercise municipal taxing power for purely city uses; and we earnestly urge the Court to make for the State Court, and the gentlemen who represent the defendant in error, the distinction between municipal and political subdivisions of the State, such as counties, townships, &c. Municipal is a legal and technical term appertaining to a town or city, especially in such adjudications as now before this Court. We admit it has been extended when treating of municipal law, &c., but in such cases as now before the Court, it is applicable to local measures which may exist within the commonwealth without affecting its general laws. Now, if plaintiff in error's land is a *farm*, and not city territory, used or needed nor appropriated by the owner to city uses, then the case is ended. If it is a *farm*, and the city of Pittsburgh has imposed upon it ruinous municipal assessment, call them taxes or anything else, without conferring the benefits of its government, then the appellant is entitled to relief by the numerous adjudicated cases of this Court. Local taxation, commensurate with local benefits, and not beyond, which cases are numerously cited in our argument in chief, which we will not here repeat. The evidence presented in the Record is conclusive that no benefits are conferred on plaintiff in error's *farm*, and that the municipal burthens are consumptive and inevitably disastrous; and the plaintiff in error, in all sincerity, appeals to the Court, on the law and the facts, the first not answered, the second admitted, "saying my property and my interests are entitled to some protection." This earnest appeal, so fully sustained in fact, is called by defendant in error's counsel a "pretense by a tax-payer." We admit a city,

as defendant in error's counsel urge, must have public buildings, water works, police and fire departments, and that they are stamped as necessities; but does this prove that the farming population requires these things, or that plaintiff in error's *farm* has them, when the Master's report, and all the evidence in the case, show that none of these benefits are extended to it. Plaintiff in error does not complain of inequality, but denies the right of the city of Pittsburgh to tax his farm at all.

It is intimated that the Courts of Kentucky and Iowa "appear to have departed from the settled construction given to this subject by the Courts of the other States of the Union." The Pennsylvania decisions are cited, and wherever the constitutional provision has been interposed, the rulings have been in harmony with the Courts of Kentucky and Iowa, and in a decision of that Court since, to wit:

Seely *vs.* City of Pittsburgh, 1 Norris, 360, the Court, without hesitation, claimed the right to interpose, on constitutional grounds, for the relief of the citizen, and referred approvingly to the former decisions, in accord, as aforesaid, with the Courts of Kentucky and Iowa.

In Mayor, &c., of Newark, *vs.* State of New Jersey, American Law Register, 441, the Court, Beasley C. J., says: "In a government in which the legislative power is not omnipotent, and in which it is a fundamental axiom *that private property cannot be taken without just compensation*, the existence of an unlimited right in the law-making power to concentrate the burthen of a tax upon specified property does not exist. * * * It has its limit, and the only inquiry is, where the limit is to be placed."

In Weisman *vs.* Village of Douglas, 64 N. Y., 90, the latest reported case from the Court of Appeals of that State, and overruling the previous doctrine seemingly held in that State as to the unlimited authority of the Legislature in all matters concerning taxation, Folger J., rendering the opinion of the Court, says: "When, however, we come to deal with the power of taxation in reference to the purpose for which it is to be exercised, we may not admit as much. It cannot but be conceded that there is an end to it somewhere. Every mind must be able to conceive of some legislative attempt to exercise this

great and extensive power, which would fail to find warrant either in our written constitution or in any inherent governmental authority, and which the owner of property subjected to it would have the right to resist. To use the most uncommon illustration, it must be far beyond the reach of legislative authority to take the property of A, or of A and some, many, or all others, and give it to B, when there is no legal or equitable, just or moral obligation to render unto B one farthing. But to tax A and others to raise money to pay over to B, is only a way of taking their property for that purpose. If A may of right resist this, as surely he may, how is he to make his resistance effective and peaceable save through the Courts, which are set to be his guardians? How may the Courts guard and aid him unless they have the power, upon his complaint, to examine into the legislative act, and to determine whether the extreme boundary of legislative power has been reached and passed? So that the Legislature is not sole, supreme and unrestrainable therein, and the Courts are not debarred, but may as a co-ordinate branch of the government, scrutinize and measure the legislative act, always keeping in mind that the Legislature is the primary authority which is to inquire what is the proper purpose for the application of money to be raised by taxation, and the necessity of taxation to subserve it, and that it must be quite clear that it has erred before the Courts can arrest the consequences of its action."

The plaintiff in error, James Kelly, shows to the Court here by receipt of City Treasurer, that the city of Pittsburgh has been and is forcing him to pay as municipal assessment on his *farm* of 80 acres, twenty-six hundred and seventy-two dollars and forty-eight cents annually, when not a solitary benefit is returned and not a solitary city improvement touches it, and that the roads for the accommodation of his *farm* are not as good as before his *farm* was included in said city's limits. The evidence in the case, uncontradicted, shows said farm is positively injured by being within city control. To this must be added $428.47 county tax; total, $3,100.95. This is confiscation beyond doubt, for the place cannot be utilized in any manner to pay exceeding five hundred dollars and repairs annually. Is his appeal for relief the *pretense of a tax-payer?*

In applying the construction thus enunciated by Justice Folger as the rule of law of New York, it is immaterial to the plaintiff in error whether the money exacted from him is given directly to an individual B, as in the illustration cited, or is given to a corporation, civil or political, to be distributed among its members, as in the present instance to the city of Pittsburgh, to be expended for the use and benefit of the town or city in fact through its local government, which, in its negative or preservative character, does not and cannot extend its protection to the preservation of his rights or property, or in its positive or creative character does not and cannot extend to him any interest in the conveniences and privileges created by it. In either case it is far beyond the reach of real legislative authority * * * and is only a way of taking his private property for this purpose; but say the counsel for defendant in error, it is given for public purpose and public benefit. In that case the New York Court says: "However the benefit or resulting convenience must be direct and immediate from the purpose and not collateral, remote or consequential. It must be a benefit or convenience which each citizen of the community may lay his own hand to in his own right, and take into his own use, at his own option, upon the same reasonable terms and conditions as any other citizen. He may not be made to depend for it on the spontaneous action of others, or to receive it in uncertain degrees or manner or roundabout way, or hampered with distinctions and conditions." What plaintiff in error, James Kelly, gets, is the annual consumption of a portion of his *farm*, and the destruction of the commercial character of the balance, so that it will not sell, nor quit his possession by gift. He is forced to be the involuntary observer of his own certain ruin in property. Again, we ask, is not property entitled at the hands of the law to some protection?

The quotation made from Cooley on Taxation has no bearing on the case before the Court, for at best it is but a loose opinion upon the conduct of his peers, with neither the law nor the facts before him. The writer, however, did not escape our attention when examining the question, and therefore we advert to it now. Cooley says: They (Kentucky and Iowa

Judges) do not question legislation as being in excess of legislative authority, but they leave the legislation stand. Of course they did, as Judge Marshall said. In Southgate *vs.* City of Covington, 15 B. Monroe, it is not the legislative boundary that is complained of; that injures nobody. It is the tax that Southgate complains of. So in this case, we let the legislation fixing the boundaries stand, and would so if they were ten times greater, for the mere legislative demarkation does us no injury, and we might inquire of Judge Cooley, or the Court or counsel who cite him as authority, when or where a Court ever interfered with a law which injured nobody, and of which no one complained? This is done, says Judge Cooley, "by an inquiry into the facts and a substitute of the judicial conclusion for the legislative on a subject not at all judicial; a subject, too, the proper limits of city extension." Now it does not appear that the question of proper limits of city extension has anything to do with the question before the Court, and the inquiry into the facts relate to the taxes imposed by defendant in error on plaintiff's property, on an issue between them, and if Judge Cooley intends to say that in such a case the Legislature is more competent to try an issue of facts affecting private rights than the Courts, he can enjoy his opinion. The Legislature can try no issue of facts, and it is simply nonsense to claim for it such a power.

We submit if the learned counsel desired the Court to take into consideration an *expost facto* law in rendering these opinions, then there was an impropriety in bringing to the attention of the Court a law passed since this suit was instituted; and if it is, as thus introduced by the appellee to have any effect, it is *pro tanto* a confession of the wrong inflicted by the appellee upon the appellant, and of which he complains, and by his suit seeks relief.

The question of jurisdiction has been fully presented by my learned colleague in his argument filed herewith, and in conclusion we do most earnestly request the examination of the case, and ask this Honorable Court to say under the construction, placed by Mr. Justice Bradley in the case of Davidson *vs.* Board of Administrators of New Orleans, of the Fourteenth Amendment, viz., "due process of law": "The

article is a restraint on the legislative as well as on the executive and judicial power of the government. * * * * I think, therefore, we are entitled under the Fourteenth Amendment, not only to see that there is some process of law, but "due process of law" provided by the State law when a citizen is deprived of his property; and, that in judging what is "due process of law," respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of them; and if found to be suitable or admissable in the special case, it will be adjudged to be "due process of law," but if found to be arbitrary, oppressive, and unjust, it may be declared to be not "due process of law." Such an examination may be made without interfering with that large discretion which every legislative power has of making wide modificatious in the forms of proceedure in each case, according to the laws, habits, customs, and preferences of the people of the particular State may require," whether or not the monstrous oppression and wrong by the city of Pittsburgh, acting under claim of legislative authority, is to be justified and sustained.

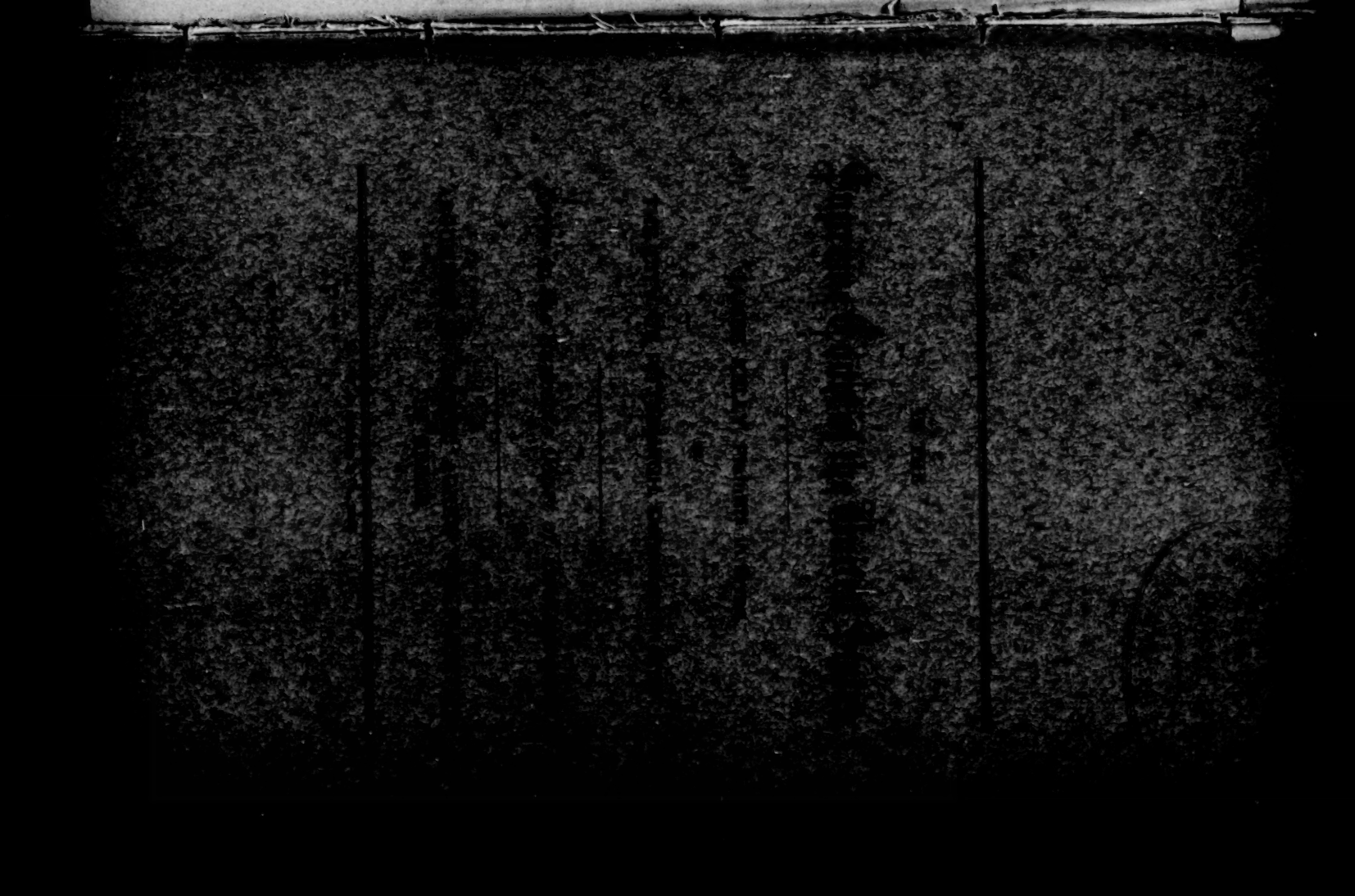
Relief must come from some source, and we believe it can only come from the judiciary; or else the property of the plaintiff, and the hundreds of his neighbors similarly situated, will, in a short time, be entirely consumed.

The vital importance of this cause to the parties in interest, is the only excuse we can offer for the length of our argument.

Respectfully submitted,

Luther M. Pike. ALBERT N. SUTTON,

Of Counsel for Plaintiff in Error.



IN THE

Supreme Court of the United States.

JAMES KELLY, Plaintiff in Error,

vs.

THE CITY OF PITTSBURGH, Defendant in Error.

Error to the Supreme Court of Pennsylvania.

ARGUMENT OF DANIEL AGNEW FOR PLAINTIFF IN ERROR.

This is a taxation case in which hundreds are interested, but I shall waste no time in an exordium. In the year 1867, when times were good, the Legislature of Pennsylvania created a western metropolis of grand proportions, extending miles up the rivers Monongahela and Allegheny, and down the Ohio. Making the cities of Pittsburgh and Allegheny the nucleus, the law included eleven boroughs, seven whole townships, and parts of five others. *Act of April* 6, 1867, *P. L.*, 846. This territory was divided into three districts for a popular vote. The middle district alone was

ratified by the people, the vote of Pittsburgh preponderating largely over the townships. It included Pittsburgh, Lawrenceville, and five whole townships—Pitt, Oakland, Collins, Liberty and Peebles; all lying in the wedge between the rivers Monongahela and Allegheny, and extending far out into the country.

James Kelly, the plaintiff, is the owner of a dairy farm of eighty acres, in Collins township, in the midst of other farms, and distant about six miles from the built-up city, and from water and gas pipes, sewers, police beats, and fire *apparati*. It is traversed only by the old township roads, and has not been laid off into lots. Penn avenue, extending by special legislation far into the country, runs not far from this farm, but, with two other minor streets, does not touch it. This legislation was peculiar, and was pronounced unconstitutional by the Supreme Court of Pennsylvania in its charge upon frontage, on the very ground that it embraced *rural* property. Seely vs. Pittsburgh, 1 *Norris (or 82d Penn'a)*, 360, will give the Court a correct idea of the character of these improvements, alleged by the city to be made near to Kelly's farm. It is not pretended, however, that this farm has in fact the benefit of city improvements. Its city advantages are simply ideal, and theoretical.

In 1874 two thousand six hundred and seventy-two $\frac{88}{100}$ dollars were assessed as taxes on a corrected valuation of $244,000, while the actual rental was but ten dollars per acre, or eight hundred dollars on the whole. Of this assessment $2,115.06 were for city purposes exclusively—police, water, fire, and building. The effect of this is to compel Kelly's dairy farm to pay an exorbitant sum for the benefit of the inhabitants of the old city. His private property is taken for the special and exclusive benefit of others, and not for those general governmental purposes to which, as a citizen of the State, county and township, he is bound to contribute. This, he contends, is contrary, not only to the State Bill of Rights, and the latest current of State decision, but is contrary to the Constitution of the United States, and entitles him to his remedy in this Court.

Do not think it extravagant, when I say that the proceeding is wicked, which thus confiscates Kelly's property. Let me explain.

In 1867, the year when the city was extended, this farm was valued for taxation at $5,840, and the taxes were but $183.52. In 1873, the year of the adoption of the new Constitution, the valuation was $7,200. Now, mark the leap. In 1874 the valuation was $371,380, and the taxes $3,148.55. Do you ask what was the meaning of this jump from $7,200 to $371,380, in one year? The new Constitution ordained that the debt of no city, county, or other municipality, shall exceed *seven* per centum upon the *assessed* value of the taxable property therein. What avails a constitutional limit against ingenuity, with its hands in the city pocket? Raise the valuation, the percentage falls, and yet there is plenty of money, while the Constitution is a cypher. Another fact, Jay Cooke failed September 18th, 1873, while this saltatory assessment took place in 1874, when the country was paralyzed by the shock. For an illustration of the *modus operandi*, see Appendix A.

This fraudulent valuation is not the only ground of relief, though it is plainly confiscation, not taxation. But it is connected with other grounds yet to be stated, which constitute a privation of property without due process of law, and a denial of the equal protection of the law, contrary to the first section of the Fourteenth Amendment of the Constitution of the United States, a ground I hope to show beyond refutation. For its effect upon James Kelly, *vide* Appendix B.

Two important preliminary questions are presented:

1. Upon the power of this Court to furnish a remedy.

2. The true intent and scope of the first section of the 14th Amendment.

The first is included in the second; yet as a new rule has been given in the *post bellum* amendments of the Constitution, it is proper to distinguish this from former cases, and former times from the present.

In Barron vs. Baltimore, 7 *Peters*, 243, it was held by this Court, through C. J. Marshall, that the 5th Amendment, in one of its clauses protecting private property, was a limitation on the power of the General Government only, and, therefore, the remedy for State infringement of the right of private property must be left to State tribunals. His doctrine was, that limitations expressed in

—that technical phrases and terms, having a fixed meaning when the Constitution was adopted, must have their received sense. Hence, we interpret "*habeas corpus*," "bill of attainder," "trial by jury," "levying war," "*ex post facto*," and the like, by their known meaning at the time. This is the rule stated by C. J. Marshall, in the trial of Aaron Burr, when he said: "It is scarcely conceivable that the term ("levying war") was not employed by the framers of the Constitution in the sense which had been affixed to it by those from whom we borrowed it." Murray, Lessee, vs. Hoboken Land Company, 18 *Howard*, 276. The words, "due process of law," (says Justice Curtis,) were undoubtedly intended to convey the same meaning as the words, "by the law of the land," in *Magna Charta*, 2 *Inst.*, 5. Lord Coke, in his commentary on these words, says, they mean "due process of law." In precise accord are the Pennsylvania cases of Fetter vs. Wilt and Irvin's Appeal. 10 *Wright*, 46 *Pennsylvania*, 460; 16 *Pennsylvania*, 263. The same exposition is found in Mr. Cooley's Constitutional Limitations, citing many authorities. *Chapter* 9, *page* 353. He adopts Mr. Webster's statement in Dartmouth College vs. Woodward, 4 *Wheaton*, 519: "The meaning is, that every citizen shall hold his life, liberty and property, and his immunities, under the protection of the general rules which govern society. But everything which may pass under the form of an enactment is not to be considered the law of the land." "If this were so (he says), acts of attainder, bills of pains and penalties, acts of confiscation, acts vacating judgments, acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures, in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void." In Bank of Columbia vs. Okely, 4 *Wheaton*, 235, Mr. Justice Johnson said, of these words from *Magna Charta*, "they were intended to secure individuals from the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice." These explanations of the term "due process of law," are good sense, and are supported by numerous citations in Mr. Cooley's work, *pages* 352, 353, 354, 355, 356 and 357. He sums up by saying: "When the govern-

ment, through its established agencies, interferes with the title to ones property, or with his independent enjoyment of it, and its action is called in question, as not in accordance with the law of the land, we are to test it by those principles of civil liberty and constitutional protection, which have become established in our system of laws, and not generally by rules that pertain to forms of procedure." This, I conceive, is the true test, as applied to fundamental rights—those great principles of civil protection of property, when truly and justly applied, by the law of the land, to the *public* good. Authorities, post 18, 19, 20.

Taxation proceeds from the law of the land; but its test is the *public* good, otherwise it falls before the true principles of constitutional liberty. Is the tax complained of to be levied according to these principles of civil liberty and constitutional protection, which have become established in our system of laws? Or is it an unjust exaction—an imposition for the benefit of a class only—of a certain body of persons for their own exclusive use? If these taxes are not such as the plaintiff's property should be rightfully taken to pay, the law used to compel payment is not due process. *Due* process implies a rightful and just proceeding—otherwise the constitutional provision is nugatory. Who shall inquire whether the process is due—that is, the law rightful—according to the fundamental rights of the party? The question is clearly *judicial.* Assessor and collector obey the command of the law, and cannot inquire into its validity. The warrants to assess and to levy the tax are not *ipso facto* due process of law; the *validity* of the law itself must be determined, and this can be only in a court of justice. If the State Court refuse to inquire, or if it asserts its inability to inquire, because of an absolute power in the State Legislature to pass the law, it is clear the property of the citizen, if unjustly taken, is taken without due process of law.* If a mere act of legislation cannot be reached and inquired into *at all* in the State tribunals, then, in the language of Mr. Webster: "Such a strange construction would render constitutional provisions of the highest importance, completely inoperative and void." This is precisely our case, which infringes upon the Constitution of the United States, as will soon be shown. But I must first advert to some de-

*That an inquiry into the validity of the tax law was demanded and denied, is set forth in the 14th section of the bill (Transcript p.p. 5 & 6). By affirming the judgment the Court refused to inquire into this denial of jurisdiction to tax the plaintiff's farm.

cisions of this Court upon these words. In Kennard vs. Morgan, 2 *Otto*, 481, the Chief Justice accepted the statement of counsel, that due process of law is when done "in the due course of legal proceedings, according to those rules and forms which have been established *for the protection of private rights.*" And in Davidson vs. New Orleans, 6 *Otto*, 105, Justice Miller says, "It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has by the laws of the State a fair trial in a court of justice, according to the modes of proceeding applicable to such a case." This, he says, was, in substance, stated also in McMillin vs. Anderson, 5 *Otto*, 37.

Accepting these statements as correct, it is proper to say a word of the facts of the cases to which the opinions apply. In Kennard vs. Morgan, the Chief Justice states that the Louisiana act "relates specially to the Judges of the Courts of the State and to the internal regulations of a State in respect to its own affairs." Hence the Chief Justice said: "Irregularities and mere errors in the proceedings can only be corrected in the State Courts. Our authority does not extend beyond the examination of the power of the Courts below to proceed at all." He then finds ample provision in the State law for a fair trial, with notice to the parties. McMillin vs. Anderson is a case of similar character. The case concerned the regularity of a tax assessment, and the Court, through Justice Miller, held that due process of law existed, because the law required the assessment to be submitted to a court of justice, with notice to the owners of the property for homologation or allowance. The party had a fair opportunity of objecting, if his property was unduly taken.

But no case has been decided that asserts that the mere fact that the party has an *action* at law or in equity, is sufficient *per se*, when the Constitution or a law of the United States is the subject of inquiry. More is required—the remedy must be effective, and it is not effectual if the State Court do not decide upon the force or effect of the United States law or Constitution, either because it will not, or because it alleges a want of power; or if it err in its decision against the United States law or Constitution. In any of

these cases the party loses the benefit of the protection of the United States, and the State law is consequently *quoad hoc*, not due process of law. For this reason this Court proceeded to inquire, in the cases cited, whether the process under the State law was due —that is to say whether it was adequate to his protection. If the remedy be insufficient, or if the State Court decides erroneously against the guaranty of the private right in the 14th Amendment, it is evident that the doctrine of the finality of the judgment of the State Court would subvert the supremacy of the Constitution of the United States, and make the decision of the State tribunal the supreme law in a case involving the Constitution of the United States. This led Justice Miller, in McMillin vs. Anderson, to say that the decision of the Supreme Court of Louisiana was conclusive on all questions mooted in the record, *except that on the 14th Amendment.* In like manner Justice Strong said, in Olcott vs. Supervisors, 16 *Wallace*, 689: "But it must be kept in mind, that it is only decisions upon local questions, those which are peculiar to the several States, or adjudications upon the meaning of the Constitution or statutes of a State, which the Federal Courts adopt as rules for their own judgment." And following this, referring to the legislative power of taxation, he says: "Now, whether a use is public or private is not a question of constitutional construction. It is a question of general law. It has as much reference to the Constitution of any other State, as it has to the State of Wisconsin. Its solution must be sought, not in the decisions of any single State tribunal, but in general principles, common to all courts. The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power, are matters which, like questions of commercial law, no State Court can conclusively determine for us."* He then proceeds to examine the extent of the legislative power in that case. Now this is the precise question before you—the extent of State power. Kelly's farm was taxed upon an enormous valuation, to pay for purposes exclusively for the benefit of the population of the old built-up city; and not for those general public purposes, recognized everywhere and in all courts. The State Court held that his property could be so taken, because the legislative power is absolute and unlimited in the *letter* of the

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*This doctrine that the decisions of State Courts are not binding in this Court upon questions of general law, but only in matters peculiar to the State, is reasserted by Justice Harlan in the recent case of Oates vs. First National Bank of Montgomery.—*Pittsburgh Legal Journal, Aug.* 11, 1880, p. 270.

State Constitution, and that these exclusive uses of the old city were sufficiently public to justify compelling his farm to pay therefor. We contend that, though there be no literal limitation, the power to tax is limited in the very nature of free government; that the uses or appropriation of these taxes are clearly confined to a *class* of persons *living in the built-up city*, and his property is therefore taken illegally, and without *due* process of law, and contrary to the right of equal protection by the law. This is the great question to be discussed hereafter, but at present it is sufficient to refer to it, as exhibiting the jurisdiction and power of this Court to correct the error of the State Court.*

Before passing to the main question, some views limiting the effect of the 14th Amendment, demand attention. It is supposed this amendment extends only to the negro—the emancipated slave. But if any one concerned in its production think so, he "builded better than he knew." "All persons born or *naturalized* in the United States are citizens thereof." The slave was a native, not a *naturalized* person—"and of the State wherein they reside." This is not the predicate of a slave State only, but of any—every State. Who shall not be deprived of the privileges of citizens of the United States, of life, liberty, property—the equal protection of the laws? The negro only? Has the white man none of these rights? Is he only to be remitted to the judicial tribunals of the State which has deprived him of his rights? No, truly, the sun of federal liberty beams as brightly and impartially on him—on every citizen, native or naturalized, when once within the folds of federal citizenship.

Who will deny these great constitutional rights? Not your Honors. You will not contemn a nation's will, and deny a nation's fundamental law to any citizen, native or foreign born. He who would confine this amendment to the former slave would yield his country's proudest title to *nationality*. Time was when personal rights were secure only against federal encroachments. The General Government might aim its cannon against the foreign aggressor, but could not curb a petty State. But, aroused by secession and arms, the nation has, by her *post bellum* amendments, reached her full stature of nationality in the protection she gives to all her citizens. Placed on the high plane of federal power, the

*For the views of the people see App. C.

meanest and the greatest, bond or free, may now call for her protection.

Again, it is thought that an interpretation which places the General Government on this elevated height of nationality, will open a flood-gate of business, and add to the labors of this Court. The thought is low and selfish, but this Court, towering up with the nation's grandeur, will never permit its illustrious character to be tarnished by such an act of abnegation. It is incompatible with the high aims of free government. A people's welfare—a nation's justice, and its honor, forbid us all to abjure our true interests by an interpretation so narrow, and so destructive of human rights.

I am not one-idead. I have no peculiar views, but I love justice to every man, white or black. And when I consider the grandeur of this amendment in the protection of personal rights, and to reach a nation's dignity and power, I feel elevated by the thought, and looking into the distant future, as sustained by your judgment, I realize that no Roman cry can surpass this grand exclamation—"I am an American citizen." It expresses a nation's power, her glory, her honor, and her responsibility—and it brings every American heart to consider the illustrious part you play in the great role of human liberty and happiness. This Court sits in judgment on the most momentous questions of international, constitutional and civil law, rising, with elastic step, to the highest pinnacle of national welfare, and descending gracefully to the defense of the humblest individual right. Individual rights, once doubtful, now absolute, dawning upon men with benignant light, in the 14th Amendment, have now a protection no art can qualify and no power destroy. On your wisdom and adjustment of these vast interests, hang the welfare and the happiness of a great people, filling half a continent.

These preliminary questions disposed of, I come to the main contest—the validity of the taxation complained of. If there be no authority to levy on mere farms these special taxes, which benefit only the old built-up city, the ordinance imposing them, and the proceedings under it, are not due process of law; the taxes are not imposed for a warrantable public purpose; the plaintiff's property is unlawfully taken without due process, and the equal protection of the law is denied to him, contrary to the 14th Amendment.

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Before developing this position, the cases must be distinguished, in which the power of State taxation cannot be inquired into, from those falling within the 14th Amendment, where it *must* be inquired into. In doing this, I find great aid in the opinion in the recent case of Kirtland vs. Hotchkiss, decided at December Term, 1879. There a citizen of Connecticut held a bond and mortgage upon a citizen of Illinois, secured on property in Chicago. The opinion refers to the cases deciding that matters of hardship or even oppression by the State, in the exercise of its lawful authority to tax, cannot be inquired into. The conclusion is so well stated by Justice Harlan, I make use of his words: "It may therefore be regarded as the established doctrine of this Court, that so long as the State, by its system of taxation, does not entrench upon the legitimate authority of the Union, or violate any right recognized or secured to the citizen by the Constitution of the United States, this Court, as between the citizen and his State, can afford no relief against State taxation, however unjust, oppressive or onerous." As a consequence, this Court held, that the debt in the bond was property, for which the creditor, as a citizen of Connecticut, might be taxed by his own State.

But when the State deprives a citizen of property for a purpose not the lawful ground of taxation—a purpose not public but essentially private, as if it takes A's property and transfers it to B—or the property of one class to give it to a different class, it is no longer taxation but *simple privation*, and falls directly within the 14th Amendment. The essence of taxation is, that it is for a public purpose. Consequently, if in this case the taxation is for a purpose for which the State can not lawfully authorize a municipality to impose taxes—not merely onerous and oppressive, but infringing upon the limitations of private property, and therefore protected by the 14th Amendment—it must fall.

On this point the language of Justice Strong, cited from Olcott vs. Supervisors, becomes pregnant with meaning: "Whether a use is public or private is not a question of constitutional construction, but of general law." These and "the extent of unrestricted legislative power (he says) are matters which, like questions of commercial law, no State Court can conclusively determine for us."

This brings me at once to the doctrine of the Court below, that the taxing power of the State is absolute, and has no limit, unless it can be found in the *letter* of the Constitution. Says the Judge delivering the opinion—"Again, taxation is peculiarly a legislative power, and before we can undertake to revise it, we should have a clear warrant therefor in the letter of the Constitution." This, I shall show, is clearly an error, yet it is the very foundation—the postulate of the entire opinion. The Judge supposes he finds this in the language of Chief Justice Gibson, in Kirby vs. Shaw, 7 *Harris*, 19 *Penn'a*, 238, a case more misunderstood than any in the books, growing out of the generality of the language of Judge Gibson, without reference to the facts of the case, to wit: The special interest of the inhabitants of Towanda in the purpose of the tax. The language of that opinion, cited by the Judge in this case, is this—"As regards taxation there is no limitation of it. Equality of contribution is not enjoined by the Bill of Rights, and probably because it was known to be impracticable." This quotation is better answered by Justice Sharswood, in Hammett vs. Philadelphia, 15 *P. F. Smith*, 65 *Penn'a*, 154, who says: "As to Kirby vs. Shaw, although a case on the very verge of the principle established—local taxation for local purposes—and there are some generalizations in the judgment pronounced by Chief Justice Gibson by far too broad; yet, ultimately, it is put on the ground of peculiar benefit." Hammett's case is now a leading authority in Pennsylvania, upon the power of taxation. But it is surprising the learned Justice, in the present case, did not perceive the answer he makes to his own proposition in his citation from Sharpless vs. Philadelphia, 9 *Harris*, 21 *Penn'a*, 147. Says Black, C. J.—"A tax law must be considered valid, unless it be for a *purpose* in which the community taxed has no palpable interest—where it is palpable the burden imposed is for the *benefit of others*, and where it would be pronounced so at first blush." Now, this is the very ground of the plaintiff's objection. These farmers, in five townships, are all taxed for city purposes, in which palpably they have no benefit. Other citations show clearly the meaning of Chief Justice Black, *p.* 168: "But I do not mean to assert (he says) that every act which the Legislature may choose to call a tax law, is constitutional. The whole of a

public burden cannot be thrown on a single individual under pretense of taxing him, nor can one county be taxed to pay the debt of another, nor one portion of the State to pay the debt of the whole State." Germain to this language, why shall I not add—"nor can a township be taxed to pay the debt of a city." The principle is the same, want of specific interest. Again he remarks, *p.* 169—"Taxation is a mode of raising revenue for *public* purposes." And further—"But the right to tax depends on the ultimate use, purpose and object for which the fund is raised, and not on the nature or character of the person or corporation, whose intermediate agency is used in applying it." Strange that the Justice, in this case, did not perceive in these quotations the answer to his own argument, that the mere *extension of the city boundary* gave this corporation a power to tax *farmers* for what they ought not to pay. Sharpless vs. Philadelphia arose upon subscriptions by the city to the stock of two railroads, and was decided by three Judges against two, and was soon afterwards corrected by an amendment of the State Constitution; yet, even in that case, Chief Justice Black concedes the very point of this case.

The Court below also refers to the doctrine that mere *inequality* of taxation is not a ground of objection to a tax law. This doctrine was not denied. When the taxation is for a *proper public* purpose, the mere condition or situation of the individual tax-payer does not prevent payment. *Personally* he may not participate in the benefit, but as a citizen of the State, he has that general interest in government which requires him to contribute. He must pay to repair a road, though he never travels it—to support a school, though he has no scholars to send—to support the poor, though he is not needy.

But it is a clear error to conclude that the taxing power has no limit because it is not found in the *letter* of the Constitution; and that the citizen is liable to *special* taxation for the benefit of a *distinct* class of persons in which he has no interest. On the contrary, whenever taxation comes into conflict with any of the fundamental principles of the Declaration of Rights, it must yield. "It is very clear (says Sharswood, J.) that the taxing power cannot be used in violation of the provisions of the Bill of Rights, everything in which

is excepted out of the general powers of government, and shall forever remain inviolate." Hammett vs. Philadelphia, 15 *P. F. S.*, 65 *Penn'a, p.* 151.

It is as great an error to hold that there is no limitation in the *nature* of the tax. This is evident in reason and authority. "Taxation (says Mr. Cooley), having for its legitimate object the raising of money for *public* purposes, and the *proper* needs of government, the exaction of money from citizens for other purposes is not a proper exercise of this power, and must therefore be unauthorized." *Constitutional Lim., p.* 487. "An unlimited power to make any and everything lawful which the Legislature might see fit to call taxation would be, when fairly stated, an unlimited power to plunder the citizen." *Ibid*, 488.

Referring to the power delegated to municipalities, Justice Sharswood said, in Durach's Appeal—"There is no limitation of these powers expressed in the Constitution of Pennsylvania, as there is in the Constitutions of some of our sister States, but nevertheless there are limits in the nature of things. The Legislature cannot, under the name of taxation, take private property for public use, without compensation, and a special tax levied on an individual would infringe this restriction, for one mode of enforcing payment is by the seizure and sale of the property of the delinquent, which is a direct taking." 12 *P. F. S.*, 62 *State*, 494. "No doubt (he says) all taxation should be general, and as far as practicable, equal. Legislation either to benefit or burden particular classes, under the idea that it is for the good of the State at large, infringes upon the natural right of 'acquiring, possessing and protecting property, subject only to fair and equal contributions to the just and necessary expenses of government, in the exercise of proper and legitimate functions.'" These principles clearly forbid the city or the State to compel farmers to pay the special expenses of the inhabitants of a compact city. It is of no consequence whether this be done by a direct command, or indirectly by a law extending city limits over farming lands. "If the Legislature can, by a mere extension of boundary, authorize the city to tax farm lands for purely city purposes, it might, without extension, direct all farms within given lines, outside of the city, to pay these city taxes. Thus, when we

get rid of that confusion of thought which confounds extension of boundary and power of taxation, we perceive that taxes laid on farms to pay city expenditures, applicable only to the built-up or true city, is nothing more than an order to farmers to pay for the benefit of city residents; it is taking the money of A to pay for improvements for the use of B. This is palpably and flagrantly unjust, and against common rights." Dissenting opinion in Kelly vs. Pittsburgh, 4 *Norris*, 85 *State*, 181.

Legislation in Pennsylvania ran to great lengths on the subject of local taxation and assessments for special benefits; and the Courts kept pace until it was found that such legislation was running wild, when a counter current set in. To a certain extent, the people themselves applied a remedy in the amendments of 1857, and in the new Constitution of 1873. The first real check on general principles was given in the case of Hammett vs. Philadelphia, *Supra*, in which the doctrine of taxation was elaborately examined by Justice Sharswood, in 1870. It was therein held that an ordinance was void which authorized Broad street to be paved at the expense of abutting property, under a law which required the city to occupy the street as a public drive, carriage way, street or avenue, and that the duty fell on the public, and not on the adjoining property owners. Previous to that case, two important decisions pointed to and led the way. Durach's Appeal and Hilbish vs. Catherman, 12 *P. F. S.*, 62 *Penn'a*, 491; 14 *P. F. S.*, 64 *Penn'a*, 154. After these came Washington avenue, in 1871, 19 *P. F. S.*, 69 *Penn'a*, 352, wherein the foundation of the taxing power was again examined quite elaborately. It was held that the Legislature had no power to compel the owners of farms, lying within a mile on each side of a macadamized public highway, to pay for making it, by assessment on their lands by the acre. In each of these two cases the law was pronounced to be unconstitutional, on the ground that the taxing power has limits, both in nature and in the principles asserted in the Bill of Rights. 19 *P. F. S.*, 69 *Penn'a*, *p.* 363. In the last case it was said: "I admit that the power to tax is unbounded by any express limit in the Constitution—that it may be exercised to the full extent of the public exigency. I concede that it differs from the power of eminent domain, and has no thought of compensation by way of a return for

that which it takes and applies to the public good, further than that all derive benefit from the purpose to which it is applied. But, nevertheless, taxation *is* bounded in its exercise by its own nature, essential characteristics and purpose. It must, therefore, visit all alike in a reasonably practicable way, of which the Legislature may judge, but within the just limits of what is taxation. Like the rain, it may fall upon the people in districts, and by turns, but still it must be public in its purpose, and reasonably just and equal in its distribution, and cannot sacrifice individual right by palpably unjust exaction. To do so is confiscation, not taxation—extortion, not assessment, and falls within the clearly implied restrictions in the Bill of Rights."

These two cases were followed by a series of decisions, running in the same current. In Seely vs. Pittsburgh, 1 *Norris*, 82 *Penn'a*, 360, decided in 1876, the per foot frontage rule for paving Penn avenue was denied, in the case of a law *averaging* the frontage in the city and the country, within the city limits, as the means of ascertaining and assessing the cost per foot on each owner, whether of a lot or farm, or other rural property. In principle that case is precisely this. Its foundation is the difference between city lots and a compact population, and rural or farming lands and a sparse population. The mixture of lots, lands, and farms is so incongruous, in the nature of such improvement, it forbids a common taxation. The same principle, had it been decided conversely, would have justified the taxation of farms along a turnpike road to pay for making it. Seely vs. Pittsburgh was reaffirmed in Kaiser vs. Wise, 4 *Norris*, 85 *Penn'a*, 360, in 1878; and again followed in Bidwell vs. Pittsburgh, 4 *Norris*, 85 *Penn'a*, 412; and Craig vs. Philadelphia, *Pittsburgh Legal Journal*, *Sept.* 10, 1879, in 1879. Another case, equally pertinent, was decided in 1878—Saw Mill Run Bridge, 4 *Norris*, 85 *Penn'a*, 163, in which it was held that a bridge crossing a small stream at a public highway, was a *public* improvement, and that individuals could not be assessed with its cost, on the ground of benefits. This course of decision has settled it in Pennsylvania, that taxation has limits in the very nature of things; and the fundamental rights of property secured by the Declaration of Rights can-

8 Norris, 265.

*Again reaffirmed February, 1880, in Phila. vs. Rule.—8 *Weekly Notes*, 245-6.

not be impaired by tax laws which assess property for special purposes, in which the owner is not interested.

These fundamental principles of taxation are recognized by eminent Judges in this Court. In Fletcher vs. Peck, 6 *Cranch*, 87, Chief Justice Marshall said: "It was well doubted whether the nature of society and government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of individuals, fairly and honestly acquired, may be seized without compensation? To the Legislature all legislative power is granted, but the question whether an act transferring the property of an individual to the public be in the nature of *the legislative* power, is well worthy of serious reflection."

In Calder vs. Bull, 3 *Dallas*, 386, Justice Chase said, "The people of the United States erected their Constitutions or forms of government to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect persons and property from violence. The purposes for which men enter into society will determine the *nature* and *terms* of the social compact; and as *they* are the foundation of the legislative power, *they* will decide what are the *proper* objects of it—the nature and ends of legislative power will limit the exercise of it." Again, "There are certain *vital* principles in our republican institutions, which will determine and overrule an apparent and flagrant abuse of the legislative power—as to authorize manifest injustice by positive law, or to take away that security for personal liberty or *private property* for the protection whereof government was established."

These were the pure principles of civil liberty on which our ancestors established free government, causing a throne to topple and an oligarchy to fall.

Says Justice Story, in Wilkinson vs. Leland, 2 *Peters*, 657, "That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate

and disregard them—a power repugnant to the common principles of justice and civil liberty—*lurked under any general grant* of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being, without strong and direct expressions of such an intention." These are wise and fitting words, yet the Court below did that very thing. It presumed an absolute legislative power because there were no words in the *letter* of the Constitution to limit the general grant. *Ante*, page 13. Says the Judge of the plaintiff: "He may not be personally benefited by the fire and police departments, but the general municipality is largely benefited thereby, and his welfare is found in the prosperity of the municipality." This is a violent presumption on which to rest the legislative question. So every farmer in the vicinity of a large town, and outside of its boundaries, will find his interest benefited by its prosperity; yet this would be a slender ground to rest upon the right to tax him for special town purposes. Such reasoning would compel not only the farmers in the five included townships, but all, in all the townships in the wedge between the two rivers, to pay the special taxes of the city proper, if brought within the city boundary.

In Corfield vs. Coryell, 4 *Wash. C. C. R.*, 380, 381, Judge Washington inquires into the privileges and immunities of citizens of the States, and has no hesitation in confining these expressions to those privileges and immunities which are in their nature fundamental, such as "belong of right to the citizens of all free governments." In the enumeration, he includes "the enjoyment of life and liberty with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety." But of what value are these fundamental rights, if left subject to the mere discretion of unlimited legislative power? What protection have they, in these degenerate times of modern skill in the manipulation of municipal affairs?

I can find no stronger expression of these views, or more fitly suited to our case, than that of Justice Miller, in Loan Association vs. Topeka, 20 *Wall.*, 662, 663, 664. "It must be conceded (he says) that there are such rights in every free government beyond

the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism." "There are limitations on such power which grow out of the essential nature of all free governments —implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name." Then, as to taxation, he continues: "Of all the powers conferred upon government, that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used, and the extent of its exercise is in its very nature unlimited."

This strikes the very point, the *purpose* being lawful the *power* is unlimited; but the doctrine of the Court below would make the purpose lawful, because of unlimited power. It is therefore clear, that when a law or an ordinance selects an improper object of taxation, or a purpose that plainly violates the right of private property, it is contrary to the first principles of the social compact, and is not a rightful exercise of legislative power.

Continuing the remarks of Justice Miller, in reference to taxation as a power to destroy, he says: "This power can be as readily employed against one class of individuals, and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there be no implied limitations of the uses for which the power may be exercised." He concludes: "We have established, we think, beyond cavil, that there can be no lawful tax which is not laid for a public purpose." A public purpose is manifestly one of those uses for which citizens of the State must contribute for the public welfare, not for merely exclusive or *class* benefit.

And even if not expressly forbidden by the State Constitution, when the 14th Amendment was adopted, it rose superior to any State law or Constitution conflicting with the rights secured by it.

This effect is stated by C. J. Marshall with his usual clearness in McCullough vs. Maryland, 4 *Wheaton*, 316: "But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed by the Constitution, and like

sovereign power of every other description, is trusted to the discretion of those that use it. But the very terms of the argument admit that the sovereignty of the State in the article itself is subordinate to and may be controlled by the Constitution of the United States." "It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their interference." Therefore this taxation conflicting, as we have seen, with the plaintiff's right of private property, in taking it to pay the peculiar and exclusive expenses of a *class* belonging to the old or built-up city, must fall before the supremacy of the Constitution of the United States, no matter what may be the decision of the State Court upon the State Constitution. To take Kelly's money and transfer it to the use of the residents of the old city, for fire, water, police, and building purposes, is to give it to another class of persons for a local use, for which the citizens of the State, of whom he is one, are not liable to contribute. And in this precise point does the Court below again err, in alleging the purpose of the tax to be one for which every citizen of the State is liable.

The doctrine contended for by us is supported by highly respectable authority outside of this State. It is pointedly reviewed and decided in the following cases, which I leave to the examination of my colleague and of the Court: Cherry vs. Hoover, 9 *B. Monroe*, 330; Covington vs. Southgate, 15 *Ibid*, 491; Morford vs. Unger, 8 *Iowa*, 82; Langworthy vs. Dubuque, 13 *Ibid*, 86; Fulton vs. Davenport, 17 *Ibid*, 404; Bradshaw vs. Omaha, 1 *Nebraska*, 16. The opinions in some of these cases are very elaborate and convincing.

Much of the opinion of the Court below is devoted to questions not made by the plaintiff. It is not contended he can escape from general taxation, such as township and county levies. Hence the argument that the power of the township to levy municipal taxes passed over to the city, has no place in the case. The error of the opinion is in invoking the doctrine of transfer to justify the taxation of farms for special city purposes, peculiar to the old built-up city. Even that section of the plaintiff's bill quoted by the Judge does not, on a fair interpretation, and especially in view

of other parts of the bill, raise his question. It uses, loosely, the words "municipal" and "city," as synonimous terms, but it, in very terms, refers to those taxes for which "no single benefit has been received." As a whole, the bill clearly raises the precise point as to those taxes which are local and peculiar to the built-up city. Transcript, p.p. 4 and 5, Secs. 8 & 14.

The case of Smith vs. McCarthy, 16 *P. F. Smith*, 56 *Penn'a*, 359, cited by the Judge, decided only the right of the Legislature to extend the city limits, but held nothing upon the subject of taxation. We have shown that the indirect and inferred power of the city to tax, in such a case, is no greater in extent than a direct authority to tax farms for the peculiar expenses of the compact city. The taxing power remained as before, to tax farms for the general purposes for which they were always liable, but not for the uses of a distinct class of persons, peculiar to themselves. The only difference extension of boundary makes, is to place the exercise of the taxing power, for these respective purposes, in the hands of the City Councils instead of the township or county.

Again, the opinion, following the reasoning of the Master, drifts into the adjacent but different region of *mere inequality*, as where one is taxable for schools, who has no children to send, or for roads not traveled by him. This is not disputed, but is only another form of saying that the citizen is liable to be taxed for the general purposes of government, though he receives no special benefit from the tax. But this does not prove that he is liable to pay for a special local purpose, for the benefit of a distinct class of persons.

The difficulty of discriminating between urban and rural property is made an argument, but it is plain this does not obviate a reasonable exercise of the power, or deny the power of the Legislature to bring rural property within city limits, to prepare the way for the future, and extend, ultimately, the benefits of the city to the rural part.*

In connection with this, a point is made upon the legislative classification of the property within city limits into urban and rural, and the case of Kitty Roup (*not reported*) was cited by counsel on the constitutional power to classify. But this does not touch our point. The power to *classify* the subjects of taxation into rural

*But there is no real difficulty in the discrimination. All that is necessary is in the ordinance ordering the assessment to direct it to be made of farm or rural lands for street or highway, school and poor taxes only, and not for those special city purposes from which these farm or rural properties derive no benefit.

and urban is essentially different from the power to impose a tax for the benefit of others constituting a different class of persons. In the matter of the *valuation* of the different properties, rural and urban, it was quite proper to say the rural should be assessed for taxes at two-thirds or one-half of the rate of valuation of the urban, as a means of attaining a proper proportion of the tax which the rural is liable to pay. This is only a legislative mode of determining the relative proportion of the tax which the rural must pay as compared with the higher values of compact city lots and houses. But it is very evident this does not justify the city in laying a tax on rural property, for which it is not liable at all. If not liable for the tax at all, it is not liable to two-thirds, or any proportion of it. This is just our question. We say it is not liable for any part of the taxes of the built-up city, for police, fire, and other exclusively city purposes. Classification of his farm is therefore, in this respect, simply inofficious; though for other purposes, such as township taxes, it may be good.

There are some cases cited by the learned Justice, which are entirely inapplicable, and show his misconception of our position. For example, Weber vs. Reinhart, 23 *P. F. S.*, 73 *Penn'a*, 370, is a case where the owners of the ore beds were directly interested in the roads over which their ore was hauled, and had no reason to complain of the special tax which was laid on them to improve and keep these roads in repair. In Kirby vs. Shaw, already noticed, the citizens of Towanda were directly interested in the court house for the rebuilding of which the tax was laid; a case pronounced also, in Hammett vs. Philadelphia, as on the very verge of the taxing power for local purposes. Sharpless vs. Philadelphia has also been sufficiently noticed. Time has disclosed the interest of Philadelphia in her great railroad system to be much greater than even C. J. Black supposed. Spear vs. Blairsville, 14 *Wright*, 50 *Penn'a*, 150, was decided on the principle that the State and her municipalities had an interest in the bounty taxes intertwined with her life, high as liberty, and broad as the Union. The opinion of the learned Justice, in this case, is supported by no decided cases which are now authority, but is opposed by the great current of

Before leaving this discussion, I must correct a fundamental error of the Master, patent in the record. It is the foundation of his argument, and seems to have been followed by the Court incautiously. To rid himself of the enormous valuation of 1874, he distinguishes between the productive or proved value of its product and the commercial or estimated value, in the supposed rise of property by being brought within the city limits, a fact which he reports as *disproved.*

I give the Master's argument in his own words, ***Paper Book,*** *page* 18 Trans., p. 15—29,30.

"The averment in the bill, by Mr. Kelly, that the assessment of his land and consequent taxes are many times more than the cash or commercial value thereof, &c., is denied by the answer, which puts the burden of proof on him, and the evidence to overcome the denial in the answer must be that of two witnesses, or what is equivalent thereto. Proof that the property is comparatively unproductive, I think, is far from sufficient in opposition to the answer, to establish the charge that this assessment is more than the commercial or cash value of the land."

Now, this alleged *denial* in the answer, on which the Master builds his argument, is a palpable mistake. The 13th section avers the unconscionable assessment in these words (***Paper Book, page*** 24): "And your orator further shows that the defendant (city) on said *farm*, for the year 1874, has increased her assessment, consequently, taxation, about seven hundred per cent. over that of 1873." It then avers this was done to evade the constitutional provision. The answer is in these words (***Paper Book, page*** 8, *section* 13): "Affiant denies positively that the increase of valuation of the real estate within the city limits was for the purpose of evading any constitutional provision." Thus the fact of the excessive valuation is admitted, and the fraudulent intention only denied. Again, the next section (14th—***Paper Book, page*** 24) repeats the allegation, by reference to "this action taken by the city." The answer (14th section—***Paper Book***) is this: "The facts alleged in this paragraph are not denied." Thus the foundation of the Master's argument, the "*denial,*" is contradicted by the record.

Trans., p. 5—10.

Trans., p. 10—18.

*The 14th section is in these words: 14th. That when he was advised of *this action* taken by the defendant (city) by her agents and servants, he made application to the board of revision for grievances and errors in assessments, and protested against this assumption of jurisdiction over his farm lands by defendant (city) for *city* purposes only, when he had paid all county and other taxes on his said lands; that he even asked for a reduction, denying at the same time any right in defendant (city) to tax his said lands; his appeal was overruled and dismissed, and all redress was refused him.

This is not all. The 9th section of the bill (*Paper Book*, p 22) avers both the extravagant valuation and the amount of tax while the answer (*Paper Book*, *page* 8) admits the facts, exc the amount of the taxes, and the Master finds the taxes as sta by the plaintiff, except a discrepancy between $2,672.63, taxes, a amount paid, $2,432.68, which, he says, he has no information account for.—*Paper Book*, *page* 17. Trans., p. 14–28.

The established character of the property is charged and mitted over and over again—a *farm*, so used many years, so c tinued to be; never laid off into lots, not intended to be, and n held for a rise in value. See, specially, sections 1, 4, 5, 8 and bill and answer. Its actual value as a farm is also charged a not denied (*Paper Book*, *page* 14), and the allegation is found be true by the Master. From 1859 to 1864 its rental was fi dollars per acre; from 1864 to 1874 eight dollars per acre. A these facts are elements of value, flatly contradicting the Master assumption of commercial value; and as he is mistaken in t fact of *denial*, in the answer, they stand as proof of the plaintiff averment. This is sufficient to disprove the supposed commerci value of the property; but, unfortunately for the Master, h himself finds against his own assumption. He says (*Paper Boo page* 16): "Most if not all the witnesses examined on part c Mr. Kelly, are of opinion that Mr. Kelly's land has not been increased, but rather diminished, in value by having been brought into the city. The city examined no witnesses on this question, or, indeed, any other, except Mr. Dempster, the City Engineer. He thinks the land has increased in value since consolidation."

Thus the plaintiff's case is clearly and strongly proved and admitted, and the Master's distinction between productive and commercial value, and his argument founded on a supposed denial in the answer, are swept away by the record itself and his own findings. It is not the case of a fact *in pais* found by the Master, but his own conclusion of reasoning, of which the Court can judge as well as he, and is bound to correct if erroneous. See Phillips' Appeal and Sproul's Appeal, and cases cited. 18 *P. F. S.*, 68 *Penn'a*, 138; 21 *P. F. S.*, 71 *Penn'a*, 138.

The argument of the Court below, founded on the benefits conferred by being brought into the city, is therefore without foundation.

In conclusion, allow me to dwell, for a moment, on the importance of this case. It involves the well being of all our great cities, and the highest interests of the people. None can know better than your Honors, before whom the affairs of the people are ever passing, as in a series of dissolving views, the evils attending municipal government, and the constant watchfulness necessary to preserve the rights of the citizens. Municipal government is a necessity; yet, in the midst of thick and crowded populations, men lie in wait, like beasts of prey, ravening to despoil and fatten on the property of others. The law of to-day, is evaded by ingenious expedients to-morrow. The wrong which raised a valuation of a small farm from $7,000, in a single leap, to $371,000, to wrest money from the oppressed citizen, illustrates the evil. There must be a power to avert such wrongs. It can be done only by upholding the sacred guaranties of the Constitution, and enforcing the duties of government, warning State tribunals that they may not "rush madly in where angels fear to tread." If not done, boast not of Declarations of Independence and of Bills of Rights; they are torn nets, through which wealth and power break, holding only the weak, the poor, and the oppressed. When my eyes look abroad over the great cities and crowded populations of this land, and I see the luxury, wealth and power of the few, and the misery and degradation of the many, my thoughts will turn toward the end, as it was with Rome, and I cannot avoid asking myself how soon another Gibbon will rise to proclaim the decline and fall of my country. There is but one escape from this dire result, and it lies in the action, example and influence of a high and impartial Court, preserving the true boundaries of liberty and rights, and holding sacredly the strong guaranties of the Constitution.

APPENDIX.

A

EXTRACT FROM THE PITTSBURGH TELEGRAPH OF JANUARY, 1880.

In those good old days, a farmer was thought to be as well entitled to eat of the fruits of his investment and his labors as any other man living, but when the ring determined on swallowing us up, and all we possessed, every resort was taken to accomplish it. Let us look in a moment into that sink of fraud and sham—the Board of Equalization. A gentleman is addressing the chair, and stating that a little property in the suburbs that was assessed at, I think, $30,000, he was instructed to say that any one who wished it could have a deed of it for $12,000, when one of the honorables sings out: "I move that $5,000 be added to the assessment," while another seconds the motion, when the motion is put by the chair and carried affirmatively; and while the gentleman is trying to get a word in, he is told that he can go, as his business is settled.

B

EXTRACT FROM THE PITTSBURGH COMMERCIAL GAZETTE, JANUARY 6, 1880.

TAXED TO DEATH!—THE END OF JAMES KELLY!

A sad scene took place in the Common Pleas Court room yesterday, which illustrated the fleeting character of the possessions of this world. It was the spectacle of an aged, gray-haired man, past the allotted term of years, listening to the sound of the Sheriff's voice, which steadily diverted his estate from beyond his control.

* * * * * * * * * * *

Mr. James Kelly is now in his eighty-eighth year, and his name and figure are familiar to all old residents of the city. He was born here, and lived in a plain stone house—one of the oldest in the county, standing near the station at Wilkinsburg—all his life. Mr. Kelly began life as an honest, plodding farmer, and being possessed with a desire to accumulate property, from time to time he purchased land, in small tracts, in Wilkins township, until he possessed in the neighborhood of 1,100 acres. * * * He owned eighty acres of rural land within the city limits, which was used for dairy purposes, and for which he was taxed $1,000 per acre, being compelled to borrow money to meet his taxes. * * * The revenues of his lands, which were mainly unimproved, had never been large; and when the financial simoon of 1873 swept over the country with its blighting breath, his property greatly depreciated in value, and he plunged deeper into the troubles which have eventually overwhelmed him.

Mr. Kelly has always been a large-hearted, liberal man; and had he to-day but a portion of what he has given away for schools, churches, and charitable objects, he would be accounted a man of means. He gave large sites for the Sheltering Arms, the House for Aged Protestant Women, the Deaf and Dumb Institute, and many churches and schools. In fact, his purse has ever been open in the cause of charity. He had long contemplated the erection of an industrial school for boys, but his troubles have blasted this project of a kindly heart. In his distress, he has the sympathy of all our citizens.

C

NOTICE OF TAX-PAYERS' MEETING.

October 22, 1878.

The object of this meeting is for the purpose of forming permanent organizations in each election district, of the agricultural and rural territory of the east end of this city, having for its purpose the amelioration of property holders, and the procuration of some

more *equitable* method of levying and collecting taxes from and on rural and farming lands, as it is evident that the present method is even worse than outright confiscation, inasmuch as it is now taking by taxation all we can wring from our property, and the taking of the property will follow the taking of our money;—it is simply a question of time. After the experience we have had, and are now having, it behooves us to be up and doing, and now is the time for action. The Supreme Court, in a case where the rental of a farm without any of the municipal benefits was $800, and the taxes were over $2,500, decided that the trouble was of a legislative nature, and that they could give no relief, admonishes us that we have but ourselves, and the righteousness of our cause, to rely upon. A new Legislature is now about to be elected, and, thank God, we still have the ballot left us—shall we not use it?

If our farms are to be taxed up to, and in many cases over, what they will rent for, let the old city go and do likewise. If property be a means of support, then, truly, its productiveness ought to be and is, its true measure of value; but income, in our case, is utterly ignored, and we are valued at fancy and imaginary values—out of all proportion to rental, and our homes are virtually confiscated. Where is this thing to stop? Are we to pay fire tax on our land, and yet no means, nor little use, for fire extinguishing appliances? and, indeed, if all was at hand, the great body of our wealth, *i. e.*, our land, will not burn. Are we to pay water works' interest tax, and not a pipe within water range? Are we to pay police tax, and no police in our neighborhood, and, indeed, no need for them? Are we to pay gas lighting, and no gas? Are not these things too inequitable to be borne longer? Is it not a question of the hour—that we now act, and act promptly and energetically?

That this deplorable state of affairs is no fault of ours, is clear, when we submit the following facts; and that this state of legal oppression has been thrust upon us, in violation of our will as expressed at the ballot box, and that our enforced alliance was, and is, the fruit of partial, unfair, and undemocratic legislation.

The Act of the Legislature of 1867, for the enlargement of the boundaries of the city, etc., proposed to consolidate three several localities, viz.: Allegheny City on the North Side, Birmingham, and

other small boroughs, on the South Side, and several townships and one borough between the rivers Allegheny and Monongahela, and East of Pittsburgh—the two former being well built up and suited for municipal laws, and the latter being mainly agricultural and rural lands; but, strange as it may appear, these two former localities were accorded the right, under that Act, to become a concomitant part of the city, as the voters thereof might elect to do, *i. e.*, stay out or come in, of their own option—they choosing the former. But, strange to say, the square miles of sparsely settled farm and rural territory were accorded no such option, but were appended to the old and populous City of Pittsburgh, as part of ONE VOTING DISTRICT! And notwithstanding their large majority against consolidation, in the part to be consolidated, the old city voted to take them in by a majority of 3,556 votes, whilst the total *pro* and *con.* in the five townships and one borough, (viz.: Pitt, Oakland, Collins, Liberty, Peebles, and the borough of Lawrenceville, where the main *pro* vote came from,) was but 2,156. Was this not a Hobson's choice for the new district? Had we been accorded the same option that the others were, and allowed a separate vote, free from outside influence, we would not to-day be under the blighting influences we are now suffering, and have suffered so long.

What is the remedy for this state of affairs? We answer, one of three things:

First. Separation and an equitable settlement, which will at least give us a future; or,

Second. *Exemption from such taxation* as we are not in receipt of benefits in kind—such as fire, interest on water works' bonds, when not within reach, and receive no water, etc.; or,

Third. Legislation taking cognizance of rental values as a basis for taxation of real estate, and especially of rural and farming lands.

We ask nothing but fair treatment, if this forced alliance must be continued. We are goaded to this action by reason of the legal oppression under which we are, and have been, suffering so long. We never asked for consolidation, and could only vote against it, and did so, but our voice was disregarded. Oh! Liberty, what wrongs are committed in thy name!

OFFICE SUPREME COURT U.S.
FILED
OCT 17 1881
JAMES H. McKENNEY, Clerk.

No. 294.

SUPREME COURT

OF THE UNITED STATES.

JAMES KELLY,

Plaintiff in Error,

vs.

THE CITY OF PITTSBURGH.

BRIEF OF ARGUMENT AND AUTHORITIES OF DEFENDANT IN ERROR.

THOS. S. BIGELOW,
GEORGE SHIRAS, JR.,
For Defendant in Error.

IN THE

Supreme Court of the United States

JAMES KELLY, *Plaintiff below and in Error,* vs. THE CITY OF PITTSBURGH.	ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

DEFENDANT IN ERROR'S BRIEF OF ARGUMENT AND AUTHORITIES.

First.—This record does not present a question arising under the Constitution or laws of the United States, and the writ of error should therefore be dismissed.

It is true that, in the first and second assignments of error, the judgment of the Supreme Court of Pennsylvania is alleged to have been declared in disregard of the Fifth and Fourteenth Amendments to the Constitution of the United States; and it may be conceded that the provisions of those amendments were cited and relied on by the Plaintiff in error in the court below.

But, in view of the unanimous decision of this court in the case of *Davidson* vs. *New Orleans*, 6th Otto, 97, it is not now open to claim that the policy of a State in the assessment and collection of taxes can be considered and controlled by the Federal Courts.

The facts in that case were very much like those in the case in hand. It was not pretended that the party complaining had been refused the benefits of the laws of the State, but it was contended that, because the taxes assessed were in alleged excess of the benefits

conferred and were unequal, such taxation could be deemed as contravening those provisions of the Federal Constitution which forbid any State from depriving any person of property without the process of law, or from denying to any person the equal protection of the law. But this court were of opinion that the "due process of law" to which the Constitution has reference, was observed in the regular assessment and collection of taxes, and that alleged inequality of taxation did not confer jurisdiction upon the Federal judiciary under that or any other clause of the Constitution.

It is therefore respectfully submitted, that we are not called upon to go further than to cite this case.

Secondly.—If the court should think fit to reconsider the question decided in *Davidson* vs. *New Orleans*, then we cite and rely upon the reasoning in that case and in the original and leading case known as the *Slaughter House cases*, 16th Wall. 36. See likewise, *McMillen* vs. *Anderson*, 5th Otto, 37; *Kirtland* vs. *Hotchkiss*, 10th Otto, 491, and *Missouri* vs. *Lewis*, 11th Otto, 22.

We regard these cases as fully establishing the following propositions:

1st. That each State has the right to make political sub-divisions of its territory for municipal purposes, and to regulate their local government.

Missouri vs. *Lewis, ut supra.*

2d. That against taxation by a State, however erroneous and excessive, there is no remedy to be found in the supervising powers of the Federal Court. That the measure of contribution which persons resident within a State shall make by way of taxation, in return for the protection it affords them, is a matter which concerns only the people of that State, with which the Federal government cannot rightly interfere.

Kirtland vs. *Hotchkiss*, 10th Otto, 499.

McCullough vs. *Maryland*, 4th Wheat. 428.

If we read these cases aright, they conclusively call for the affirmance of the judgment of the court below as not presenting a case in which this court exercises supervising power.

Thirdly.—If the court should be of opinion that this record does present a Federal question, and that the cases already cited are not decisive of the question, then we are brought to a consideration of the soundness of the judgment of the court below.

There were two questions presented. Had the Legislature of Pennsylvania power to prescribe the territorial limits of a municipal corporation? If the legislation by which the land of the Plaintiff in error was brought within the limits of the City of Pittsburgh was valid, were the assessment and collection of taxes thereon for municipal purposes illegal?

The first question was not seriously pressed in the court below. That precise question was considered and resolved in the affirmative in the case of *Smith* vs. *McCarthy*, 6th P. F. Smith, 359, where a bill had been filed by owners of property brought by an Act of Assembly within the limits of the City of Pittsburgh, to restrain the corporation from availing itself of the legislation on the alleged ground that their lands were rural and agricultural and would not be benefited by being brought within the city limits. But the court held that the question was one of legislative power only, and that the courts could not interfere.

The second question, as to the alleged illegality of the assessment and collection of municipal taxes as against lands so brought within the city limits, without the individual consent of the owner, was the one principally mooted in the court below, and the one in which it is now sought to take the opinion of this court.

The general doctrine is thus laid down in Cooley's Constitutional Limitations, 488: "It must always be conceded that the proper authority to determine what should and what should not properly constitute a public burthen is the legislative department of the State; this is not only true of the State at large, but it is true also in respect to each municipality or political division of the State; these inferior corporate existences having only such authority in this regard as the Legislature shall confer upon them. * * * There will be expenditures which are necessary, and expenditures which rest upon considerations of policy alone; and in regard to the one as much as

to the other, the decision of that department to which alone qustions of State policy are addressed must be accepted as conclusive."

"If there be the least possibility that the tax will be promotive in any degree of the public welfare, it becomes a question of policy, and not of natural justice, and the determination of the Legislature is conclusive."

Booth vs. *Woodbury*, 32 Coun. 128

"To justify the court in arresting the proceedings and in declaring the tax void, the absence of all possible public interest in the purpose for which the funds are raised must be clear and palpable; so clear and palpable as to be perceptible by every mind at the first blush."

Broadhead vs. *City of Milwaukee*, 19 Winconsin, 652.

"As regards taxation, there is no limitation of it. Equality of contribution is not enjoined in the bill of rights, and probably because it was known to be impracticable."

Kirby vs. *Shaw*, 7th Harris, 258, per Gibson, C. J.

"The vital power of taxation," says the Supreme Court of the United States in *Providence Bank* vs. *Billings*, 4 Peters, 563, may be abused. But the interest, wisdom and justice of the representative body, and its relations with its constituents, provide the only security when there is no contract, against unjust and excessive taxation, as well as against unwise legislation."

These citations might be indefinitely multiplied from the Federal and State Reports. The only exceptions are found in the courts of Kentucky and Iowa, cited and relied on by the Plaintiff in error. Of these cases, Judge Cooley says in his work already cited: "These cases, however, do not hold the legislative act which enlarges the city limits to be absolutely void, but only hold that they will limit the exercise of the taxing power as nearly as practicable to the line where the extension of the boundaries ceases to be beneficial to the proprietor in a municipal point of view. For this purpose they enter into an inquiry of fact, whether the land in question, in view of their relative position to the growing and improved parts of the town, and partaking more or less of the benefits of municipal government are proper subjects of municipal taxation; and if not, they enjoin the

collection of such taxes. It would seem that there must be great practical difficulty—if not some of principle—in making this disposition of such a case."

The same high authority in his more recent work, "Cooley on Taxation," page 124, says: "There is no imperative requirement that taxation shall be equal. If there were, the operations of government must come to a stop, from the absolute impossibility of fulfilling it." "For excessive taxation, when fraud is not charged, there can be no relief in equity, the remedy must be such as the statute has given." Finally, we refer to the opinion of the court below as a sufficient vindication of the judgement arrived at.

THOS. S. BIGELOW,
GEORGE SHIRAS, JR.,
Counsel for Defendant in Error.

14—83

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~286~~. 46

CHARLES T. DAVIS, APPELLANT,

vs.

EDGAR SPEIDEN.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 17, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 286.

CHARLES T. DAVIS, APPELLANT,

vs.

EDGAR SPEIDEN.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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That afterward, and before the appeal in the said general term had been so disposed of, to wit, on the 3d day of November, 1876, the same being the last of the October special term, the court, on this defendant's motion, entered a final decree in said cause against this plaintiff upon the unanswered bill of the defendant, and without the taking of any evidence whatever, for the recovery from this plaintiff of the sum of $6,601, with interest thereon from September 1, 1875, and to enjoin forever the prosecution of the suit at law, a copy of which decree is filed herewith and marked Plaintiff's Exhibit No. 8.

Third. That thereafter, to wit, on the 8th day of November, 1876, the plaintiff filed a motion in the said general term to set aside the said decrees last above entered, which motion was overruled by the said general term; and thereupon the plaintiff filed his motion for a rehearing thereof, which motion for rehearing was afterwards denied; and the said court in general term, of its own motion, entered up a decree dismissing this plaintiff's said appeal and remanding the cause to this court for further proceedings.

All of which proceedings will appear from reference to the records of said court in said cause, and copies of which motions and decrees plaintiff files herewith as part of this bill, marked Plaintiff's Exhibit Nos. 9, 10, 11, and 12.

Fourth. That the said appeal was dismissed on the 18th day of
4 December, 1876, and that prior thereto, to wit, on the 20th day of November, 1877, the plaintiff entered an appeal to the said general term from the decree in said cause, entered on the 3d day of November, 1876, and regularly filed his appeal bond thereju, a copy of which order of appeal and bond is filed herewith as Plaintiff's Exhibit 13.

That thereafter, to wit, on the 3d day of January, 1877, this plaintiff dismissed his last mentioned appeal, and thereupon moved this court to set aside the said decree of this court entered on the said 23d day of September, 1876, and the 3d day of November, 1876, and for leave to answer the said bill in said cause upon its merits, and produced and exhibited the answer of this plaintiff thereto and offered to file the same. That a copy of the said order dismissing the said last-named appeal, and a copy of the motion and the said answer itself are filed herewith as part of this bill, marked Plaintiff's Exhibit Nos. 14, 15, and 16.

Thereupon the court overruled the plaintiff's motion to set aside the said decrees and for leave to answer, a copy of which order is filed herewith, marked Plaintiff's Exhibit No. 17.

Fifth. The plaintiff further says that these is error of law upon the record of said cause in entering the said decrees of September 23, 1876, and of November 3, 1876, and in overruling the plaintiff's motion to set the same aside and give him leave to answer the said bill, because he says:

1st. The appeal of this plaintiff to the general term from the decree of September 8, 1876, removed the said cause, the record of which was then composed of the bill, subpœna to answer, the demurrer, from this to the appellate court, and this court in special term no longer had jurisdiction to enter the said decrees until the said appeal was disposed of by the general term.

5 2d. The decree entered of November 3, 1876, was wholly unauthorized in law upon the face of said bill, without the taking of proofs.

3d. The said general term having dismissed the said appeal, and remanded the cause to this court for further proceedings, this court should have placed the case back in the plight and status it occupied at the

date of the said appeal, and proceeded in the said cause from that point.

4th. The appellate court alone can decide whether it has jurisdiction of appeals or not; and until it so decides, it is irregular for the special term to proceed with the cause pending on an appeal regularly entered.

The plaintiff further says that he is gr'eviously and irreparably injured by the said decree, and is not indebted to this defendant in any sum whatever, as shown by his answer filed herewith, and is wholly without remedy or relief in the matter except through the intervention of this court upon this bill.

To the end, therefore, that justice may be done this plaintiff he prays—

1st. That the said Edgar Speiden may be made defendant herein and served with process herein.

2d. That execution may be stayed upon the said decree, November 3, 1876, in said cause, until the hearing of this cause.

3d. That said decrees may be set aside and this plaintiff allowed to file his answer to the said bill, and defend this said cause upon the merits.

4th. And that he may have such other and further relief as the nature of the case may require.

CHARLES T. DAVIS.

R. K. ELLIOT,
Solicitor and of Counsel.
EDWARDS & BARNARD,
Solicitors for Plaintiff.

6 DISTRICT OF COLUMBIA, *ss:*

Charles T. Davis swears that he has read the above bill, and that the facts therein stated are true so far as stated upon his own knowledge; and that the facts therein stated upon information and belief he believes to be true.

CHARLES T. DAVIS.

Subscribed and sworn to before me this 4th day of January, 1877.

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS, *Asst. Clerk.*

JANUARY, 1877.

PLAINTIFF'S EXHIBIT No. 1.

In the supreme court of the District of Columbia.

EDGAR SPEIDEN, PLAINTIFF,
vs.
CHARLES T. DAVIS, DEFENDANT. } No. 4902. Equity.

RECORD.

Bill.

To the honorable the justices of the supreme court of the District of Columbia, sitting in equity:

The plaintiff avers and complains as follows:

1st. He and the defendant are residents of the city of Washington, D. C.

2d. The defendant being engaged in the business of a broker and

dealer in stocks and bonds, the plaintiff on the 17th day of May, 1875, purchased of him twenty thousand dollars of District of Columbia coupon bonds bearing 3.65 per centum interest per annum, payable semi-annually, as per coupons attached, on the 1st day of February and August of each year, said bonds being commonly known as District of Columbia 3.65 bonds, at the rate of 75½ per cent., said purchase
7 amounting to the sum of fifteen thousand dollars ($15,000), for which the plaintiff paid the defendant eleven hundred dollars in cash and gave him his note for $14,000, payable thirty days after date, with interest at the rate of per centum per annum, with said bonds pledged as collateral security for payment of said notes.

3d. That on the 2d day of July, 1875, the plaintiff purchased of the defendant the further sum of thirty thousand dollars ($30,000) of said 3.65 bonds, at the rate of 74¾ per cent., amounting to the sum of twenty-two thousand four and twenty-five dollars ($22,425), for which he gave the defendant his note for $21,000, payable sixty days after date, with interest at the rate of nine per cent. per annum, with said bonds pledged as collateral security for the payment of said note, and also gave said defendant his personal note for the sum of $1,425, payable at the same time and bearing the same rate of interest.

4th. That on the 15th day of June, 1875, said note for $14,000 becoming due, he paid the defendant the interest due thereon, amounting to one hundred and one dollars and fifty cents ($101.50), and gave said defendant his collateral note for $13,000, payable sixty days after date, with interest at the rate of ten per cent. per annum, with said $20,000 of bonds pledged as security, and also his personal note for $1,000, payable at the same time and bearing the same rate of interest; in consideration whereof the said defendant agreed to carry said bonds until the maturity of said notes.

5th. On the 3d day of August, 1875, said sixty-day notes of June 2, 1875, becoming due, and the market value of said bonds having depreciated to 68 per cent., he consolidated both of said purchase of $20,000 and $30,000 of said bonds, paid the defendant the interest on said notes and the margin on said bonds, amounting to $2,050, and the
8 further sum of $912.50, six months' interest on said bonds, and gave said defendant a new collateral note for the sum of thirty-two thousand five hundred dollars ($32,500), payable sixty days after date, with interest at the rate of eight per centum per annum, with said $50,000 of bonds pledged as collateral; and also gave him his personal note for fifteen hundred dollars, payable at the same time and bearing the same rate of interest; in consideration whereof said defendant agreed to carry said bonds until the maturity of said notes.

6th. That on the 6th of October, 1875, said last-mentioned notes becoming due, he paid the defendant the interest thereon, amounting to $476, and gave him a new collateral note for thirty thousand dollars ($30,000), payable sixty days after date, with interest at the rate of eight per cent. per annum, with said $50,000 of bonds, and also $1,500 of other similar bonds, pledged as security, and also gave his personal note for $4,000, payable at the same time and bearing the same rate of interest; in consideration whereof said defendant agreed to carry said bonds until the maturity of said notes.

7th. That on the 7th of December, 1875, said last-mentioned notes becoming due, and the market value of said bonds having depreciated to 65 per cent., he paid the defendant the interest due on said notes and the margin of said bonds, amounting to $1,961, and gave him a new collateral note for thirty thousand dollars ($30,000), payable ninety

days after date, with interest at the rate of eight per cent. per annum, and also gave him his personal note for $2,500, payable at the same time and bearing the same rate of interest; in consideration whereof said defendant agreed to hold and carry said $50,000 of bonds until the maturity of said note.

8th. That on the 1st day of March, 1876, having made arrange-
9 ments with other parties to pay the amount of said notes to said defendant, and take up said bonds, he called on said defendant for said bonds, when he was told by him that said bonds were in New York, and that he would have them here on the next morning. On calling again the next day, said defendant did not deliver said bonds.

9th. On the 10th of March, 1876, said notes becoming due, and said defendant having still failed to produce said bonds. I gave him an order to sell them. On that day the market value of said bonds was from 72⅛ to 72¼ per cent.

10th. That on the 13th of March, 1876, said defendant stated to him that he had not sold said bonds. The market value of the bonds on that day was the same as on the 10th of March.

11th. That on March 14, 1876, Congress passed an act providing for the payment of the semi-annual interest on said bonds due February 1, 1876, whereupon the value of said bonds appreciated to from 74½ to 75 per cent. On the same day said defendant claimed that he had sold said bonds at 66 per cent.

12th. That although frequently demanded, said defendant has not rendered the plaintiff any statement of account of said so-claimed sale, and still retains the plaintiff's two notes.

13th. That upon the defendant's thus claiming to have sold and failing to give any statement of account of sale, the plaintiff consulted his counsel, who, as the plaintiff is informed and believes, saw said defendant with reference to a settlement of the plaintiff's claim; that the defendant requested a certain time to consider the matter and consult as to his legal ability; that upon the expiration of the time granted he requested a further delay, and instead of making any response
10 to the plaintiff's counsel as to his conclusion in the matter he brought suit against the plaintiff on the 29th of March, 1876, on said $2,500 note, claiming a balance due thereon of $120 and interest, the same being case No. 15605, at law, in this court.

14th. That the defendant never delivered said bonds to the plaintiff, nor did the plaintiff ever see the same or any of them, but said defendant always claimed to have the same, and to be holding them on plaintiff's account; but from his actions and his different and contradictory statements made in relation to said bonds the plaintiff believes, and in so believing avers, that the defendant never had any of said bonds so purchased and pledged by the plaintiff as aforesaid, and that he has perpetrated a gross fraud upon the plaintiff. The plaintiff is advised and so charges and avers that he is in that event entitled to recover from the defendant the said several amounts so paid by him as aforesaid to the defendant, with interest thereon, and also that the defendant should account to him for said bonds at the highest market rates for which the same might have been sold at any time prior to the institution of this suit.

15th. The plaintiff avers that in claiming to have sold bonds at 66 per cent. the defendant is endeavoring to perpetrate a fraud upon him, and that even if said defendant had had said bonds and sold them at that rate that he would still be liable to account to the plaintiff for the market value of said bonds at the time of the maturity of said notes.

Prayer.

The plaintiff therefore prays as follows:

1st. That the said Charles T. Davis may be made a party defendant hereto and required to answer the several matters charged in this bill under oath.

11 2d. That he may be required to return to the plaintiff said two promissory notes.

3d. That your honors will pass a decree requiring the said defendant to pay to him, should it appear that said defendant has been falsely pretending to have had said bonds, the full amount of said several sums so paid as aforesaid by the plaintiff to the defendant and the difference between the highest market value of said bonds up to the bringing of this suit and said promissory notes.

4th. That if it should appear that the said defendant in point of fact did have and hold said bonds on plaintiff's account he may be required to account to the plaintiff for the market value of said bonds, either on the day of maturity of said notes or the day succeeding.

5th. That the defendant may be enjoined from further prosecuting said suit at law.

6th. That the plaintiff may have such other and further relief as to your honors may seem meet and the nature of his case may require.

May it please your honors to grant unto the plaintiff the writ of subpœna, directed to the defendant, commanding him, &c

EDGAR SPEIDEN.

I, Edgar Speiden, do swear that I have read the above bill signed by me and know the contents thereof; that the facts therein stated as of my personal knowledge are true, and those stated on information and belief I believe to be true.

EDGAR SPEIDEN.

Subscribed and sworn to before me this 12th day of April, A. D. 1876.
[SEAL.] E. C. WEAVER,
Justice of the Peace.

W. F. MATTINGLY,
Solicitor for Plaintiff.

12 PLAINTIFF'S EXHIBIT NO. 2.

Spa. to answer, &c., in No. 4902.

In the supreme court of the District of Columbia, April 12, 1876.

EDGAR SPEIDEN, COMPLAINANT,
against
CHARLES T. DAVIS, DEFENDANT. } Equity. No. 4902.

The President of the United States to Charles T. Davis, defendant:

You are hereby commanded to appear in this court at its first special term, occurring twenty days after service of this subpœna, and answer the exigency of the bill under pain of attachment, and such other process of contempt as the court shall award.

Witness D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk*,
By J. JAY CAMP, *Ass't Clerk.*

MATTINGLY.

MEMORANDUM.—That the defendant is to enter his appearance in this suit, in the clerk's office, on or before the special term to which this writ is returnable; otherwise the bill may be taken for confessed.

Marshal's return.

Sum'd Chas. T. Davis, April 12, '76.

ALEX. SHARP, *Marshal.*

13 PLAINTIFF'S EXHIBIT No. 3.

In the supreme court of the District of Columbia.

SPEIDEN *vs.* DAVIS. } No. 4902. Equity doc. 15.

Demurrer.

The demurrer of Charles T. Davis, defendant, to the bill of complaint of Edgar Speiden, the above-named complainant.

This defendant, by protestation, not confessing all or any of the matters and things in the complainant's bill contained to be true in such manner and form as is therein set forth and alleged, doth demur to said bill, and for cause of demurrer showeth that the complainant hath not in and by his said bill made or stated such a case as entitles him, in a court of equity, to any discovery from this defendant, or to any relief against him as to the matters contained in said bill or any of such matters; and, further, that the complainant is not entitled upon said bill to the relief he prays for, because he had a plain and adequate remedy at law. Wherefore, and for divers other good causes of demurrer appearing in the said bill, the defendant doth demur hereto, and humbly demands the judgment of this court whether he shall be compelled to make and further or other answer to said bill; and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

JAS. S. EDWARDS,
Solicitor for Defendant.

I hereby certify that the foregoing demurrer, in my opinion, is well founded in point of law.

JAS. S. EDWARDS,
Solicitor for Defendant.

DISTRICT OF COLUMBIA, *ss:*

14 I, Charles T. Davis, do make oath that I am the defendant in the above-entitled cause, and that the aforegoing demurrer is not interposed for delay.

CHARLES T. DAVIS.

Sworn to and subscribed before me this 5th day of June, A. D. 1876.

[SEAL.] JAS. S. EDWARDS,
Notary Public.

PLAINTIFF'S EXHIBIT No. 4.

In the supreme court of the District of Columbia.

EDGAR SPEIDEN
vs.
CHARLES T. DAVIS. } No. 4902. Equity.

The demurrer to the bill in this cause coming on for hearing, being argued by counsel and duly considered by the court, it is this 8th day of September, A. D. 1876, adjudged, ordered, and decreed by the court that said demurrer be, and the same is hereby, overruled; that said defendant have leave to answer or plead to said bill within ten days; and that he be enjoined from prosecuting said suit at law until the final hearing of this cause.

A. B. OLIN.

PLAINTIFF'S EXHIBIT No. 5.

In the supreme court of the District of Columbia, the 20th day of September, 1876.

EDGAR SPEIDEN
vs.
CHARLES T. DAVIS. } Equity. No. 4902.

The clerk of said court will enter an appeal to the general term from the order of the special term overruling the defendant's demurrer to the bill.

EDWARDS & BARNARD,
Solicitors for Defendant.

(Endorsed:) Filed September 20, 1876. R. J. Meigs, clerk.

15 PLAINTIFF'S EXHIBIT No. 6.

In the supreme court of the District of Columbia, the 21st day of September, 1876.

EDGAR SPEIDEN, PLAINTIFF,
vs.
CHARLES T. DAVIS, DEFENDANT. } No. 4902. Equity.

The defendant having appealed to the general term from the order pronounced herein on the 8th of September, 1876, in the equity court, and Augustus Davis, surety for said appeal, for themselves and each of them, their and each of their heirs and personal representatives, appearing and submitting to the jurisdiction of the said general term, hereby undertake to abide by, perform, and pay its judgment, which they agree may be pronounced against all of them.

CHARLES T. DAVIS, *Appellant.*
AUGUSTUS DAVIS, *Surety.*

Approved this 21st day of September, 1876.

A. B. OLIN.

(Endorsed:) Filed September 21, 1876. R. J. Meigs, clerk.

PLAINTIFF'S EXHIBIT No. 7.

Decree pro confesso in No. 4902 Eq. Sept. 22, 1876.

In the supreme court of the District of Columbia.

EDGAR SPEIDEN
vs.
CHARLES T. DAVIS. } No. 4902. Equity.

16 The time heretofore granted to defendant to answer or plead over having expired, and no answer or plea having been filed by him, it is by the court this 22nd day of September, A. D. 1876, on motion of Wm. F. Mattingly, solicitor for the plaintiff, adjudged, ordered, and decreed, that said bill of complaint be, and the same hereby is, taken for confessed by the said defendant.

A. B. OLIN.

17 PLAINTIFF'S EXHIBIT No. 8.

In the supreme court of the District of Columbia.

EDGAR SPEIDEN
vs.
CHARLES T. DAVIS. } No. 4902. Equity.

It appearing to the court that a decree pro confesso was entered in this cause on the 22d day of September, A. D. 1876, it is by the court, this third day of November, 1876, on motion of Wm. F. Mattingly, solicitor for the plaintiff, ordered, adjudged, and decreed that said decree be, and the same is hereby, made absolute; and that said bill of complaint be, and the same hereby is, taken as finally confessed by the said defendant.

And it appearing to the court from the face of said bill of complaint that the plaintiff made sundry payments to the defendant, as stated in said bill, as follows:

May 17, 1875	$1,100	
June 15, "	101	50
Aug. 3, "	2,050	
Aug. 3, "	912	50
Oct. 5, "	476	
Dec. 7, "	1,961	
Total	$6,601	00

Which should be refunded to the plaintiff, with interest.

It is further ordered, adjudged, and decreed that the plaintiff recover of the defendant the sum of six thousand six hundred and one dollars ($6,601), with interest thereon from the 1st day of September, A. D. 1875, until paid, and that the defendant do pay the same to the plaintiff, as also the costs of this suit, to be taxed by the clerk, and that the plaintiff have execution therefor as at law.

It is further ordered, adjudged, and decreed that said defendant be, and he hereby is, perpetually enjoined from prosecuting said action at law in case No. 15605, and that he do deliver to the plaintiff said two notes for $30,000 and $2,500, respectively, and that the same be cancelled.

A. B. OLIN.

From this decree the defendant appealed to the general term.

18 PLAINTIFF'S EXHIBIT No. 9.

Motion to set aside the decrees of special term, filed in the cause No. 4902 eq. in general term Nov. 8, 1876.

In the supreme court of the District of Columbia, in general term. September term, 1876.

EDGAR SPIEDEN
vs.
CHARLES T. DAVIS. } No. 4902. Equity.

The defendant moves the court to set aside the decree pro confesso entered herein by the special term on the 22d day of September, 1876, & the final decree of Nov. 3, 1876, and to stay all further proceedings or attempts at proceedings in this cause in the said special term
19 until the appeal herein is heard and considered by this court.

EDWARDS & BARNARD,
Solicitors for Def't.

The complainant is hereby notified that the above motion will be called up in the general term on Monday, November 13, 1876, at the meeting of the court, or as soon thereafter as counsel can be heard.

EDWARDS & BARNARD,
For Def't.

I hereby acknowledge service of above notice, 1876, November 8th.

MATTINGLY,
For Pl'ff.

NOV. 8, '76.

20 PLAINTIFF'S EXHIBIT No. 10.

Order of general term overruling above motion.

The motion filed by the defendant to vacate the decree below and to supersede further proceedings in the court in special term coming on for hearing, being argued by counsel and duly considered by the court, it is, this 20th day of November, A. D. 1876, ordered by the court that said motion be and the same hereby is overruled.

By the court.

21 PLAINTIFF'S EXHIBIT No. 12.

Decree in general term, December 18, 1876.

EDGAR SPEIDEN, COMPLAINANT,
vs.
CHARLES T. DAVIS, DEFENDANT. } In equity. No. 4902. Doc. 15.

In consideration of the defendant's aforesaid motion for a rehearing of his motion to vacate the decree below, &c., the court orders, that said motion be, and the same is hereby, overruled. And the court orders that the defendant's appeal be, and the same is hereby, dismissed with costs; and remands the case to the special term for further proceedings therein.

2 M. G. term, page 575.

PLAINTIFF'S EXHIBIT No. 13.

Appeal by def't to gen. term, Nov. 23, '78.

SPEIDEN *vs.* DAVIS. } No. 4902. Equity.

The defendant appeals to the court in general term from the judgment of the special term herein.

EDWARDS & BARNARD,
Solicitors for Def't.

Appeal entered as directed.
By the clerk.

22 *Def't's undertaking in gen'l term.*

In the supreme court of the District of Columbia, the day of , 18 .

EDGAR SPEIDEN, PLAINTIFF, *vs.* CHARLES T. DAVIS, DEFENDANT. } No. 4902. Equity.

The defendant having appealed to the general term from the decree pronounced herein on the 3rd of November, 1876, in the equity court, and Michael P. Callan, Eli S. Blackwood, & Augustus Davis, surety for said appeal, for themselves and each of them, their and each of their heirs and personal representatives, appearing and submitting to the jurisdiction of the said general term, hereby undertake to abide by, perform, and pay its judgment, which they agree may be pronounced against all of them.

CHARLES T. DAVIS, *Appellant.*
M. P. CALLAN, *Surety.*
AUGUSTUS DAVIS, *Surety.*
ELI S. BLACKWOOD, *Surety.*

Approved Nov. 23, 1876.

A. B. OIN, *Justice.*

23 PLAINTIFF'S EXHIBIT No. 14.

EDGAR SPEIDEN *vs.* CHARLES T. DAVIS. } No. 4902. Equity.

In obedience to the following precipe, "The clerk will enter the appeal in this cause from the decree passed November 3, 1876, dismissed," the said appeal is accordingly dismissed.
3 M. G. T., p. 2.

PL'FF'S EXHIBIT No. 15.

Motion in special term.

In the supreme court of the District of Columbia.

EDGAR SPEIDEN *vs.* CHARLES T. DAVIS. } No. 4902. Equity.

The defendant moves the court to set aside and vacate the decrees

entered herein on the 22d day of September, 1876, and the 3d day of November, 1876, and for leave now to answer the bill, for the following reasons:

1st. Because the defendant has, as he believes, a good and meritorious defence to said bill upon the facts.

2d. Because the said decrees of September 22d, 1876, and November 3d, 1876, were irregularly entered, this cause being then depending in the general term on appeal.

3d. Because the said appeal was, on the 18th day of December, 1876, dismissed by court in general term, and the cause remanded here for further proceedings.

EDWARDS & BARNARD,
Solicitors for Defendants.

Filed December 30, 1876.

PL'FF'S EXHIBIT No. 16.

In supreme court District of Columbia.

EDGAR SPEIDEN
vs.
CHARLES T. DAVIS. } No. 4902. Equity.

The answer of Charles T. Davis to the bill of complaint in this cause exhibited.

The defendant, for answer to the said bill, says:

1. He admits the first paragraph thereof.

2. He admits the execution by the plaintiff of the notes, as described in the 2d and 3d paragraphs of the bill, and the payment of the money by the plaintiff, as therein stated; and he denies that he was engaged in the business of a broker and dealer in stocks and bonds, or that he sold the bonds, as alleged in said paragraph, to the plaintiff.

24 He further says that, as to the said $20,000 of said bonds mentioned in the 2d paragraph, he purchased them for the plaintiff at his request, and advanced the purchase money for the plaintiff, less the amount of cash paid by the plaintiff, as stated, and received and retained the bonds by agreement with the plaintiff, as security therefor; and that, as to the $30,000 in bonds, as stated in the 3d paragraph, he says that he did not sell the same to the plaintiff, but that he loaned the plaintiff money to purchase the same, and took the bonds as collateral security for the payment of the plaintiff's said notes.

3. He admits the payment and execution of notes in renewal, as stated in the 4th paragraph, and says that such payment was made and such new notes executed in renewal of the matured notes at the earnest request and solicitation of the plaintiff.

4. He admits the facts substantially as stated in the 5th paragraph, and says that the new notes, as herein stated and payment as made, were executed and made at the plaintiff's earnest solicitation and request. He claiming that the bonds had so depreciated in value that it would be a great sacrifice to him to sell the same at that time to pay this defendant the matured demands.

5. He admits the facts substantially as stated in the 6th paragraph, and says that payment and renewal, as stated, were made only at the request and importunate solicitation of the plaintiff, who claimed that

he could not then pay the indebtedness then due and secured to this defendant by pledge of the said bonds.

6. That when the notes became due, as stated in the 7th paragraph, the bonds had depreciated to 63 or 64 cents on the $1.00, and the defendant demanded payment of his debt, but the plaintiff answered his demand by stating that it was utterly impossible for him to pay
25 the defendant, and earnestly asked and requested the defendant to give him further time, still thinking that the said bonds would appreciate in value.

To this request the defendant at first refused to accede, but on inquiry and after finding that the bonds would not then sell for a sum sufficient to pay the notes secured thereby, and upon the promise and agreement of the plaintiff that if the bonds should reach a satisfactory price before the maturity of the renewal notes, then proposed to be given, he would at once sell the bonds and pay the proceeds to the defendant, he, the defendant, finally agreed to the payment, and the extension of time on the execution of the renewal notes, as stated in the 7th paragraph.

7. On the 1st day of March, 1876, the defendant received a note from the plaintiff, of which the following is a true copy:

[Office of Edgar Speiden, real estate agent, No. 613 7th street, opp. Patent Office.]

WASHINGTON, D. C., *March* 5, 1876.

CHARLES T. DAVIS, Esq.:

DEAR SIR: Having received an offer for the $50,000 3.65 D. C. bonds you hold, I have concluded to sell. If you are disposed to purchase you can make me an offer.

Respectfully yours,

EDGAR SPEIDEN.

On the next day after the receipt of the said letter, the defendant told the plaintiff that he did not desire to purchase the bonds—not being a broker or dealer in stocks and bonds; whereupon the plaintiff flew into a fit of anger, and accused the defendant of an attempt to swindle him. The defendant denied having acted in any manner but that dictated by honesty and fair dealing, and in the best of faith throughout the whole transaction; and told the plaintiff that he would deliver the bonds to him, or to any person to whom the plaintiff might sell the same, on payment of the principal debt, with interest up to that date only.

26 On the same day, March 2, 1876, the plaintiff came into the defendant's office and said that he had made arrangements with certain parties to purchase his bonds; and immediately thereafter again asked the defendant if he would not purchase them. The defendant again declining to buy the bonds, the plaintiff went away, but returned again about 3 o'clock p. m., of the same day, and said that he had now made arrangements with Lewis Johnson & Co. to carry his bonds, and requested the defendant to send them immediately to said Lewis Johnson & Co., who would pay the defendant's claim, on account of which the said bonds were then held. The defendant being anxious to receive the debt due him from the plaintiff, and to be rid of said bonds, made immediate inquiry at the bank of said Lewis Johnson & Co., and was answered that the plaintiff had made no arrangement whatever with them concerning said bonds, either to purchase or carry the same, or to pay any money on account of the plaintiff's said debt to the defendant.

That about 4 o'clock on the same afternoon the defendant received another letter from the plaintiff, of which the following is a true copy:

entered herein on the 22d day of September, 1876, and the 3d day of November, 1876, and for leave now to answer the bill, for the following reasons:

1st. Because the defendant has, as he believes, a good and meritorious defence to said bill upon the facts.

2d. Because the said decrees of September 22d, 1876, and November 3d, 1876, were irregularly entered, this cause being then depending in the general term on appeal.

3d. Because the said appeal was, on the 18th day of December, 1876, dismissed by court in general term, and the cause remanded here for further proceedings.

EDWARDS & BARNARD,
Solicitors for Defendants.

Filed December 30, 1876.

PL'FF'S EXHIBIT No. 16.

In supreme court District of Columbia.

EDGAR SPEIDEN
vs.
CHARLES T. DAVIS. } No. 4902. Equity.

The answer of Charles T. Davis to the bill of complaint in this cause exhibited.

The defendant, for answer to the said bill, says:

1. He admits the first paragraph thereof.

2. He admits the execution by the plaintiff of the notes, as described in the 2d and 3d paragraphs of the bill, and the payment of the money by the plaintiff, as therein stated; and he denies that he was engaged in the business of a broker and dealer in stocks and bonds, or that he sold the bonds, as alleged in said paragraph, to the plaintiff.

24 He further says that, as to the said $20,000 of said bonds mentioned in the 2d paragraph, he purchased them for the plaintiff at his request, and advanced the purchase money for the plaintiff, less the amount of cash paid by the plaintiff, as stated, and received and retained the bonds by agreement with the plaintiff, as security therefor; and that, as to the $30,000 in bonds, as stated in the 3d paragraph, he says that he did not sell the same to the plaintiff, but that he loaned the plaintiff money to purchase the same, and took the bonds as collateral security for the payment of the plaintiff's said notes.

3. He admits the payment and execution of notes in renewal, as stated in the 4th paragraph, and says that such payment was made and such new notes executed in renewal of the matured notes at the earnest request and solicitation of the plaintiff.

4. He admits the facts substantially as stated in the 5th paragraph, and says that the new notes, as herein stated and payment as made, were executed and made at the plaintiff's earnest solicitation and request. He claiming that the bonds had so depreciated in value that it would be a great sacrifice to him to sell the same at that time to pay this defendant the matured demands.

5. He admits the facts substantially as stated in the 6th paragraph, and says that payment and renewal, as stated, were made only at the request and importunate solicitation of the plaintiff, who claimed that

he could not then pay the indebtedness then due and secured to this defendant by pledge of the said bonds.

6. That when the notes became due, as stated in the 7th paragraph, the bonds had depreciated to 63 or 64 cents on the $1.00, and the defendant demanded payment of his debt, but the plaintiff answered his demand by stating that it was utterly impossible for him to pay
25 the defendant, and earnestly asked and requested the defendant to give him further time, still thinking that the said bonds would appreciate in value.

To this request the defendant at first refused to accede, but on inquiry and after finding that the bonds would not then sell for a sum sufficient to pay the notes secured thereby, and upon the promise and agreement of the plaintiff that if the bonds should reach a satisfactory price before the maturity of the renewal notes, then proposed to be given, he would at once sell the bonds and pay the proceeds to the defendant, he, the defendant, finally agreed to the payment, and the extension of time on the execution of the renewal notes, as stated in the 7th paragraph.

7. On the 1st day of March, 1876, the defendant received a note from the plaintiff, of which the following is a true copy:

[Office of Edgar Speiden, real estate agent, No. 613 7th street, opp. Patent Office.]

WASHINGTON, D. C., *March* 5, 1876.

CHARLES T. DAVIS, Esq.:

DEAR SIR: Having received an offer for the $50,000 3.65 D. C. bonds you hold, I have concluded to sell. If you are disposed to purchase you can make me an offer.

Respectfully yours,

EDGAR SPEIDEN.

On the next day after the receipt of the said letter, the defendant told the plaintiff that he did not desire to purchase the bonds—not being a broker or dealer in stocks and bonds; whereupon the plaintiff flew into a fit of anger, and accused the defendant of an attempt to swindle him. The defendant denied having acted in any manner but that dictated by honesty and fair dealing, and in the best of faith throughout the whole transaction; and told the plaintiff that he would deliver the bonds to him, or to any person to whom the plaintiff might sell the same, on payment of the principal debt, with interest up to that date only.

26 On the same day, March 2, 1876, the plaintiff came into the defendant's office and said that he had made arrangements with certain parties to purchase his bonds; and immediately thereafter again asked the defendant if he would not purchase them. The defendant again declining to buy the bonds, the plaintiff went away, but returned again about 3 o'clock p. m., of the same day, and said that he had now made arrangements with Lewis Johnson & Co. to carry his bonds, and requested the defendant to send them immediately to said Lewis Johnson & Co., who would pay the defendant's claim, on account of which the said bonds were then held. The defendant being anxious to receive the debt due him from the plaintiff, and to be rid of said bonds, made immediate inquiry at the bank of said Lewis Johnson & Co., and was answered that the plaintiff had made no arrangement whatever with them concerning said bonds, either to purchase or carry the same, or to pay any money on account of the plaintiff's said debt to the defendant.

That about 4 o'clock on the same afternoon the defendant received another letter from the plaintiff, of which the following is a true copy:

And having fully answered the said bill, the defendant asks to be hence dismissed, &c.

(Signed) CHARLES T. DAVIS.

DISTRICT OF COLUMBIA, *ss:*

Charles T. Davis swears that he has read the above answer by him subscribed, and that the facts therein stated of his own knowledge are true, and those stated on information and belief he believes to be true.

(Signed) CHARLES T. DAVIS.

Subscribed and sworn to before me, this 29th day of December, 1876.

[SEAL.] MICH. P. CALLAN,
Notary Public.

31 PLAINTIFF'S EXHIBIT No. 17.

In the supreme court of the District of Columbia.

EDGAR SPEIDEN *vs.* CHARLES T. DAVIS. } No. 4902. Equity.

The defendant's motion filed in this cause on the 30th of December, 1876, to vacate the decrees heretofore passed in this cause, and for leave to answer coming on to be heard, being argued by counsel, and duly considered by the court, that said motion be and the same hereby is overruled and denied.

By the court.

32 *Spa. to answer bill of review, No. 5323.*

In the supreme court of the District of Columbia, the 4 day of January, 1877.

Subpœna to answer.

CHARLES T. DAVIS, COMPLAINANT, *against* EDGAR SPEIDEN, DEFENDANT. } No. 5323. Eq'y Dock., 16.

The President of the United States to Edgar Speiden, defendant:

You are hereby commanded to appear in this court, at its first special term, occurring twenty days after service of this subpœna, and answer the exigency of the bill this day filed, and entitled as above, under pain of attachment, and such other process of contempt as the court shall award.

Witness.

D. K. CARTTER,
Chief Justice.
R. J. MEIGS, *Clerk,*
By L. P. WILLIAMS,
Ass't Clerk.

MEMORANDUM.—That the defendant herewith served is to enter appearance in this suit, in the clerk's office, on or before the day at which this writ is returnable; otherwise the bill may be taken for confessed.

Marshal's return on back of writ.

Sum'd Jan'y 16, '77.

ALEX. SHARP, *Marshal.*

33 *Demurrer to bill of review.*

In the supreme court of the District of Columbia.

CHARLES T. DAVIS
vs.
EDGAR SPEIDEN. } No. 5323. Equity.

This defendant by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill of review to be true, in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer, sheweth:

First. That there is no error or law apparent in said decree sought to be reviewed.

Second. That said plaintiff has not performed said decree.

Third. The said bill of review was not filed within the time required by law and the rules of court.

Fourth. That after the appeal was taken to the court in general term, from said decree sought to be reviewed and dismissed by that court, it is too late to review said decree.

Wherefore, and for divers other errors and imperfections in the said bill, the defendant humbly demands the judgment of the court whether he shall be compelled to make any further or other answer to the said bill or any of the matters and things therein contained, and prays to be hence dismissed with his costs in this behalf sustained.

WM. F. MATTINGLY,
Solicitor for Defendant.

I do hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

WM. F. MATTINGLY,
Solicitor for Defendant.

I, Edgar Speiden, do swear that I am the defendant in this cause and that the foregoing demurrer is not interposed for delay.

EDGAR SPEIDEN.

Subscribed and sworn to before me this thirteenth day of March, A. D. 1877.

[SEAL.]

E. C. WEAVER,
Justice of the Peace.

Decree of special term overruling demurrer.

In the supreme court of the District of Columbia.

CHARLES T. DAVIS
vs.
EDGAR SPEIDEN. } No. 5323. Equity.

This cause coming on to be heard upon the bill of review and the de-

murrer thereto, and being argued and submitted by counsel, it is considered by the court that the demurrer ought to be overruled and the prayer of the bill granted.

It is therefore, this 18th day of April, 1877, ordered, adjudged, and decreed that the defendant's demurrer be, and the same is hereby, overruled, and that the decrees entered in this court in equity cause No. 4902 on the 23d day of September and the 3d day of November, 1876, against the complainant herein, and in favor of the defendant herein, be,
34 and the same are hereby, set aside and vacated, and that the complainant herein have leave to answer the bill in said cause instanter and for that purpose leave to withdraw the answer filed as an exhibit herein on leaving a copy with the papers in this cause.

And it is further ordered that the prosecution of the action of Davis against Speiden, No. 15605, at law, be, and the same is hereby, enjoined until the final hearing of the said cause No. 4902 in equity.

By the court.

From this decree the defendant prays an appeal to the general term, and it is ordered that the defendant give bond with security, to be approved by the court or one of the justices thereof, in the penal sum of fifty dollars conditioned to prosecute said appeal with effect.

By the court.

35 *Speiden's appeal bond.*

In the supreme court of the District of Columbia the day of 18 .

CHARLES T. DAVIS *vs.* EDGAR SPEIDEN. } No. 5323. In equity docket.

The defendant in the above-entitled case, and his surety, acknowledge themselves indebted to the plaintiff in the sum of fifty dollars, for the payment of which to said plaintiff, his executors, administrators, or assigns they bind themselves, and every of them, their, and every of their heirs, executors, and administrators, jointly and severally, for and in the whole. Sealed with their seals and dated the day and year aforesaid.

Whereas the said plaintiff has obtained a decree in his favor
36 in the above-entitled cause from which the defendant has appealed to the court in general term:

Now the condition of the above obligation is such that if the defendant shall prosecute the said appeal with effect and shall in all things obey such order and decree as this court shall make in the premises, then the above obligation to be void and of no effect; else to be in full force and virtue.

[SEAL.] EDGAR SPEIDEN.
[SEAL.] JNO. T. GIVEN.

This bond as to security is satisfactory.

EDWARDS & BARNARD,
Of Counsel.

April 27, 1877.

37 *Opinion of the court in general term, delivered by Justice MacArthur.*

In the supreme court of the District of Columbia.

CHARLES T. DAVIS *vs.* EDGAR SPEIDEN. } In equity. No. 5323.

1. It is now settled in our practice that the pleadings, orders, and proceedings in a cause, as well as the final decree, constitute that portion of the record for the purpose of examining all errors of law in a bill of review.
2. An order overruling a demurrer to a bill of complaint, and giving leave to the defendant to answer, is not appealable to the general term; but, if in such case, there is an appeal bond approved by one of the justices, it will operate as a stay of proceedings at the special term, and if any decree affecting the rights of the parties is taken at such special term during the appeal, it will be error in a bill of review.
3. Unless the averments in a bill of complaint are precise and definite, no decree can be taken without proof, although a decree pro confesso has been previously obtained, and such error may be assigned in a bill of review.
4. A party must in general perform a decree before filing a bill of review. Where the decree is for the payment of money he must either aver performance, or set up his inability arising from insolvency.

STATEMENT OF THE CASE.

This is an appeal from a decree overruling a demurrer to a bill of review. The bill in the original cause was filed in April, 1876, by Edgar Speiden against Charles T. Davis, who is the complainant herein. It alleges that the said Speiden purchased from Davis, May 17th, 1875, twenty thousand dollars of District of Columbia bonds, commonly known as 3.65 bonds of said District, for which he paid him $1,100 in cash, and gave his note for $14,000, payable in thirty days, pledging said bonds as collateral security for the payment of the note; that on the third of July following, Speiden made another purchase of 3.65 bonds for the sum of $30,000, at the rate of 74¾ per cent., for which he gave his note for $21,000, payable in sixty days, the bonds being pledged as collateral security for the payment of said note also. He gave his personal note for $1,425, payable at the same time. The notes were renewed at maturity, upon payment of the interest due thereon; in consideration of which, Davis agreed to carry the bonds, and to hold them as collateral to the notes. Another renewal of the same kind was made in October, 1875; and finally, on the 7th day of December, 1875, the market value of the bonds having depreciated to 65 per cent., Speiden paid the interest due on the note, and margin on the bonds, and gave Davis a new note for $30,000, payable ninety days after date, with interest at 8 per cent., and a personal note for $2,500, and Davis agreeing to carry the bonds as he had done before. That on March 14, 1876, Congress passed an act providing for the payment of the semi-annual interest on the 3.65 bonds, whereupon they appreciated from 74½ to 75 per cent., and that Davis then claimed that he had sold the said bonds at 66 per cent. on their face value; that, although requested to render a statement of the said sale, Davis has never done so, and retains the notes, and that he has

brought suit against Speiden on the $2,500 note, claiming a balance due thereon, on the law side of this court. The bill also alleges the belief of the complainant therein that Davis never had the bonds, and that he had perpetrated a fraud upon him.

The prayer is that Davis surrender the notes, and pay to Speiden the several sums of money which he has paid for interest and margins as aforesaid; that Davis may account for the market value of the bonds, and may be enjoined from prosecuting the suit at law.

Upon this bill an injunction issued according to the prayer thereof, and Davis having filed a demurrer, the same was overruled on the 8th September, 1876, with leave to answer the bill within ten days. An appeal from this order to the general term was perfected by filing an appeal bond on the 21st day of September, and on the 23d of the same month, notwithstanding such appeal, the complainant therein obtained a decree pro confesso for want of an answer; and on the 3d day of November following, a final decree was entered at the special term upon the bill. There was no reference to an auditor, and no proof. It was decreed that the suit at law be enjoined, and that Davis pay the said Speiden the sum of $6,601 with interest, until paid, and that he surrender the notes to be cancelled; the amount decreed to be paid corresponding in the aggregate with the several payment alleged on the face of the bill to have been paid by the said Speiden for interest and margins as already stated.

The general term decided December 18th, 1876, that an appeal would not lie from the order overruling the demurrer to the original bill, and the same was remanded to the special term for further proceedings.

Various other steps were taken in the cause with a view to setting aside the decrees pro confesso and the final one, which, having been denied, Davis filed the bill of review in this cause, setting out the whole record, and appending a copy of his proposed answer to the bill in the original suit.

The errors of law assigned upon this record are:

1st. The special term had no jurisdiction to proceed with the cause pending the first appeal. 2d. The decree of November 3 was unauthorized, without proofs. 3d. The cause having been remanded for further proceedings, the special term should have taken jurisdiction of the case as it was at the date of the appeal. 4th. The appellate court must determine its own jurisdiction, and pending such determination it is irregular for the special term to proceed with the cause, and such proceedings should be set aside on motion. Davis claims an irreparable injury by reason of the said erroneous proceedings, and that he is not indebted to the said Speiden in any sum whatever.

To this bill of review Speiden demurs, claiming—1st. That there is no error of law on the record. 2d. That Davis has not performed the decree sought to be reviewed. 3d. The bill of review not filed in time. 4th. Too late to review a decree after an appeal from it to the general term, and a dismissal of the appeal there.

After a hearing, the court in special term overruled the demurrer, sustained the prayer of the bill, set aside the decrees in original suit subsequent to appeal therefrom, and gave Davis leave to answer in said suit instanter.

From this decree Speiden appeals to this court.

R. K. Elliott and Edwards & Barnard for complainants:

Whether the appellate court had jurisdiction or not, was for it alone to determine, and pending such determination, the special term had no

authority to proceed with the cause ex parte. (1 Md. Ch. Dec., 330; 3 ib., 304; 6 Harr. & J., 328; 11 Gill & J., 137; 34 Md., 236; U. S. vs. Pacheo, 20 How., 263; Green vs. Winter, 1 Johns. Ch., 77 & 325.) The whole record was carried by the appeal to the general term, and it remained there, in contemplation of law, until December 18, 1876, when the appeal was dismissed, and the cause remanded to the special term for further proceedings. (20 How., 263.) The demurrer to the bill in 4902 was not frivolous; nor the appeal merely for delay. The following authorities strongly indicate that the relief sought by the bill could have been obtained by way of set-off in the suit at law, or by declaration at law. (High. on Injunc., sec. 46; R. S. D. C., 96, sec. 810; R. S. U. S., 137, sec. 723; Thomp. Dig., 198; 2 Black, 545; 3 Leigh., 667.)

When a cause has not been heard on its merits the court may vacate the enrollment and give the party an opportunity of being heard upon the facts, whenever such hearing has been prevented by mistake, surprise, accident, or misapprehension or negligence of the solicitor. (Herbert vs. Rowles, 30 Md., 271; Millspaugh vs. McBride, 7 Paige, 38 509; and cases cited in Freeman on Judgments, sec. 100, 589; 2 Dan'l Ch. Pr., 1038.) The court would have as much power when set in motion by a bill of review as it would on motion or petition. It may treat the bill as a motion in 4902 for purposes of substantial justice. (6 How., 39.) A judgment irregularly entered will be vacated on motion or petition at any time, notwithstanding the term has passed. (Stacker vs. Cooper Co., 25 Mo., 401; Freeman on Judgments, sec. 97.) The answer of Davis discloses a meritorious defense to the suit on the facts; and a court of equity will not permit a denial of justice through any technical mistake or misapprehension as to the proper rule of practice. The decree should not have been entered under the averments and prayers of the bill, without a reference to ascertain the facts. The bill and affidavit would not have authorized a judgment at law without proof. (Eq., rule 15.) The performance of the decree sought to be reviewed is not always necessary; the court, having discretionary power in the premises, may dispense with its performance until after hearing on bill to review. (Massie vs. Graham, 2 McLean, 41; 2 Dan'l Ch. Pr., 1,634, n.)

William F. Mattingly for defendant:

A bill of review may be brought in two cases:

1st. For error of law appearing in the body of the decree. 2d. Upon discovery of new matter. (Story's Eq. Pl., 404; Mit. & Tyler's Pl. Pr., 181; 2 Dun. Ch. Pr., 1631.)

If the decree is for the payment of money, it must be paid before the bill of review is filed; or at least secured to be paid. (Story's Eq. Pl., sec. 406; Mit. & Tyler's. 185; 2 Dun. Ch. Pr., 1631; 2 John Ch., 488; Wiser vs. Blackley.)

After the expiration of the term at which it was passed, a decree cannot be vacated, except by bill of review, for error apparent in the face of the decree, or upon discovery of new matter. (3 Wh., 591, Cameron vs. McRoberts; 12 Pet., 491, Sibbold vs. U. S.; 6 How., 31, Bank of U. S. vs. Moss; 8 Pet., 252, Bank of U. S. vs. White; 18 How., 511, McMicken vs. Perin; 22 Wall., 60, Putnam vs. Day; 1 Otto, 149, Roemer vs. Simon; 1 Wood & Mi., 62, Jenkins vs. Eldridge.) An appeal even from an appealable order does not stay proceedings below. (3 John. Ch., Riggs vs. Murray; 1 Bland, 15, Ringgold's case.)

Mr. Justice MACARTHUR delivered the opinion of the court in substance as follows:

In considering this cause, perhaps it will be as well to determine a point of practice in advance relating to bills of review. And that is as to what portion of the record we are at liberty to inspect for the purpose of discovering error in the decree sought to be modified or set aside by a bill of this nature. This practice has been regulated by the celebrated ordinance of Lord Bacon, according to which no bill of review can be entertained, unless it shows error in law appearing in the body of the decree without any other examination of fact, or proceeding in the cause. This rule was adhered to with reference to the power of a decree at that time. An enrolled decree in the English chancery consisted of a parchment upon which all the pleadings were engrossed, and the exceptions and orders made thereon, together with a statement of the facts which the chancellor found to be established by the proof; and then followed the judgment of the court. The question or error in law could be determined upon the face of the decree without any further examination. With us the decree is usually confined to the judgment of the court, and indeed the rules of the Supreme Court of the United States forbid a recital of the pleadings or other proceedings in the cause in a final decree. If the rule of Lord Bacon, before cited, is to be applied to decrees thus general in form, it will be utterly impossible to sustain a bill of review for errors in point of law. This difficulty was early provided for by the Supreme Court itself. In Whiting vs. The Bank of U. S., the court say: "It has been suggested at the bar that no bill of relief lies for errors of law except where such errors are apparent on the face of the decree of the court. That is true in the sense in which the language is used in the English practice. In England the decree always recites the substance of the bill and answer and pleading, and also the facts on which the court founds its decree. But in America the decree does not ordinarily recite either the bill, or answer, or pleadings, and generally not the facts on which the decree is founded. But with us the answer and other pleadings, together with the decree, constitute what is properly considered as the record. And, therefore, in truth, the rule is each country is precisely the same in legal effect, although expressed in different language, namely, that the bill of review must be founded on some error apparent upon the bill, answer, and other pleading, and decree; and that you are not at liberty to go into the evidence at large to establish an objection to the decree founded on the supposed mistake of the court in its own deductions from the evidence." The rule as thus explained is fully recognized in Dexter vs. Arnold (5 Mason, 311); Putnam vs. Day (22 Wall., 60); and Buffington vs. Harvey (5 Otto, 99.) We may, therefore, consider it now settled that the pleadings, the proceedings, and the decree constitute a portion of the record for the purpose of examining all error of law in a bill of review.

In pursuance of this rule we can look into the proceedings to see if there was any mistake in the decree. We find that there was a demurrer to the bill in the original suit, which was overruled at the special term, and the defendant had leave to answer the bill therein within ten days. From this order an appeal was taken to the general term, which appeal was dismissed for the reason that an appeal did not lie from an order overruling a demurrer to a bill and giving leave to answer. Much difficulty had been experienced by the court as to whether an order of this kind was appealable, and it was not until that term that it was expressly decided that an appeal would not lie from such an order.

In several instances of such appeals no question had been raised, and undoubtedly the decision of the court was unexpected by the counsel. However this may be, it cannot be doubted that as there was an appeal bond approved by one of the justices of the court, it operated as a stay of proceedings at the special term during the appeal. It appears from the proceedings that the decree of the 22d September, 1876, pro confesso, as well as the final decree on the 3d of November following, were both entered in the cause at the special term while the appeal was pending, for it was not until the 18th of December, 1876, that the latter was dismissed, and the cause remanded for further proceedings.

In this we think there was manifest error. The proper practice on the part of the complainant in the original suit to pursue, under such cumstances, was to move for a dismissal of the appeal, and thus get rid of the impediment to his proceeding in the court below. The mere fact that the order turned out to be one from which no appeal in the opinion of the court would lie, did not authorize the complainant to disregard the supersedeas, and take any order in the cause concluding the interests of the parties. For these reasons we think there was error on the face of the record.

But passing over this objection, the inquiry occurs whether the complainant in the original suit was entitled to the final decree passed in the cause, without any proof, except such as might be inferred from the pro confesso which he had previously obtained. Speiden alleged in his bill that he purchased from Davis on two occasions 3.65 bonds of the District of Columbia, making an aggregate of $50,000; that he made a small payment in cash, and gave his notes for the balance, the bonds to be held by Davis as collateral security for the payment of the notes. Several renewals took place subsequently, interest was paid, and as the bonds depreciated margins were provided for; and finally the amount was merged in two notes—one for $30,000 and the other for $2,500, the bonds all the time remaining as collateral security. He also alleges that in consequence of an act of Congress making provision for the payment of the semi-annual interest of the bonds, the value appreciated to 74½ and 75 per cent., and that Davis sold the bonds for 66 per cent. at that time. He states various requests for a settlement without success, and expresses his belief that Davis never had the bonds, and was practicing a fraud upon him. He requests the notes to be surrendered, and an action at law commenced by Davis for a balance due him on one of the notes to be enjoined. The decree in his favor was for all the money he had paid Davis for interest and margins, and which he had specifically set up in the bill. Now whether he was entitled to this amount depended upon whether Davis had sold the bonds, and when, and for how much. If Davis had sold the bonds for 66 per cent., as alleged in the bill, the proceeds would be insufficient to satisfy the notes, and hence no doubt Davis had commenced the action at law to recover the balance. We think, although there was a decree pro confesso, the averments of the bill were not of that precise and definite character as to dispense with some proof, or taking an account for the purpose of ascertaining more clearly the interest of the parties. We therefore come to the conclusion that in this respect there is also error in the decree.

But another rule of Lord Bacon that has prevailed ever since is that a party must perform the decree before the bill of review can be filed. This rule has some exceptions, or rather the court will dispense with a strict compliance of the decree under special circumstances; such as the release of a mortgage, the surrender of a lease, or of a homestead, or place of business where the party would be left in destitution, or

where otherwise it is impossible for the party to perform it. But the is no discretion left in the court where the decree is for the payment money, as in this case, unless the complainant sets up his utter inabili arising from insolvency. No excuse of this kind is stated in the bill, a we would be disposed to sustain the demurrer, and dismiss the bill wit out prejudice to filing another after the complainant had complied wi the decree. But time for filing a bill of this kind has expired, and tha course would deprive him of the benefit of the error in the decree. T obviate this result and at the same time give the defendant the benef of the rule, we will now give the complainant an opportunity t
39 bring the amount into court nunc pro tunc. This will be a sub stantial compliance with the rule, without subjecting the com plainant to the loss of his equitable remedies.

The decision of the court is that the decree appealed from overruling the demurrer to the bill of review will be affirmed upon condition tha complainant brings into court the amount of the decree in the origina suit; otherwise the decree herein to be reversed and the bill dismissed

40 *Decree in gen'l term, Ap'l 29, 1878.*

In the supreme court of the District of Columbia. In general term April, 1878.

CHARLES T. DAVIS *vs.* EDGAR SPEIDEN. } No. 5323. Equity.

This cause coming on for hearing, being argued by counsel and duly considered by the court, it is this 29th day of April, A. D. 1878, ordered, adjudged, and decreed by the court that the plaintiff in this cause be, and he is hereby, permitted on or before the 20th day of May, A. D. 1878, as and for the date of the filing of the bill of review in this cause, to pay into the registry of this court the amount of the final decree in equity cause No. 4902 in this court, the same being the sum of six thou-
41 sand six hundred and one dollars ($6,601.00), with interest thereon, from the first day of September, A. D. 1875, and the costs in said cause No. 4902; and that, upon such payment being made into the registry of the court by the time stated, the decree passed by the court at special term in this cause, on the 18th day of April, A. D. 1877, be affirmed, but in case of failure by the plaintiff to pay said amount into the registry of the court, on or before said 20th day of May, A. D. 1878, that the said decree in this cause passed at special term be, and the same hereby is, reversed and vacated; and further that the demurrer to the bill of review filed in this cause be sustained, and that said bill of review be dismissed with costs.

D. K. CARTTER,
Chief Justice.

42 *Motion of complainant to modify decree in gen'l term.*

In the supreme court of the District of Columbia.

CHARLES T. DAVIS *vs.* EDGAR SPEIDEN. } No. 5323. Eq.

It being impossible for the complainant to bring the money into court as required by the decree passed here in April 29, 1878, he now moves

the court, this 20th day of May, 1878, to modify the said decree in such manner as will enable him to have leave to amend his bill of review; or that if the decree dismissing the same shall become absolute, that the bill be dismissed without prejudice to his right of filing a new bill of review for the same cause of action, should he be so advised.

EDWARDS & BARNARD,
Of Counsel for Compl't.

Filed May 20, 1878.

R. J. MEIGS, *Clerk.*

43 *Affidavit of the compl't as to inability to pay money into court.*

In the supreme court of the District of Columbia.

CHARLES T. DAVIS
vs.
EDGAR SPEIDEN. } In equity. No. 5323.

Personally appeared before me, William H. Chase, a justice of the peace in and for the District of Columbia, the above-named plaintiff, Charles T. Davis, who, being sworn according to law, says that he is utterly unable to comply with the decree of the court in general term in the above cause, requiring him to bring into court the amount of the decree of Nov. 3rd, 1876, in order to avail himself of the benefit of the bill of review, filed in said cause; that he has no means, and no possible way by or from which he can make or raise this said money
44 to bring into court as required by said decree, and that said inability is by reason of great financial embarrassment under which he is now laboring.

CHARLES T. DAVIS.

Sworn and subscribed to before me this 18th day of May, 1878.

WM. H. CHASE,
Justice of the Peace.

Filed May 20, 1878.

R. J. MEIGS, *Clerk.*

45 *Final decree in gen'l term, May 20, 1878.*

Supreme court of the District of Columbia. May 20, 1878.

CHARLES T. DAVIS
vs.
EDGAR SPEIDEN. } No. 5323. Equity docket 16.

Now comes here into court the complainant, by his solicitor, Job Barnard, and moves for modification of the decree of general term herein made April 29, 1878, and the same being argued by said Barnard for, and opposed by W. F. Mattingly, behalf of defendant; and the court considering the same, refused the prayer thereof, whereupon the complainant prays then and there his appeal to the Supreme Court of the United States, which was allowed, and on application of said complainant his bond for said appeal was fixed at ten thousand dollars.

Clerk's certificate.

CLERK'S OFFICE,
Supreme Court of the District of Columbia:

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of proceedings of said court in this cause.

Witness my hand and the seal of said court this 3 day of September, 1878.

[SEAL.]

R. J. MEIGS, *Clerk.*
By R. J. MEIGS, JR.,
Assistant Clerk.

Justice's certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 3 day of Sept., 1878.

[SEAL.]

D. K. CARTTER,
Chief Justice.

Clerk's certificate to justice's official character.

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 3 day of September, 1878.

[SEAL.]

R. J. MEIGS, *Clerk.*
By R. J. MEIGS, JR.,
Assistant Clerk.

(Indorsement on cover:) No. 286. Charles T. Davis, appellant, vs. Edgar Speiden. Dist. of Columbia sup. court. Filed 17th October, 1878.



SUPREME COURT U.S.
FILED
FEB 6 1881
JAMES H. McKENNEY, Clerk.

In Supreme Court of the United States.

October Term, 1880.

CHARLES T. DAVIS,
Appellant,

vs.

EDGAR SPEIDEN,
Appellee.

No. 286.

Appeal from the Supreme Court of the District of Columbia.

BRIEF FOR APPELLANT.

JAMES S. EDWARDS, and
JOB BARNARD,
Solicitors for Appellant.

R. O. Polkinhorn, Printer.

In Supreme Court of the United States.

October Term, 1880.

Charles T. Davis,
Appellant,

vs.

Edgar Speiden,
Appellee.

No. 286.

Appeal from the Supreme Court of the District of Columbia.

Brief for Appellant.

James S. Edwards, and
Job Barnard,
Solicitors for Appellant.

The Case.

On the 12th day of April, 1876, the appellee filed a bill in equity, in the Supreme Court of the District of Columbia, against the complainant and appellant in this suit, the said cause being No. 4,902, Equity. *Record, p. 3.*

This bill states that said Davis was a dealer in stocks and bonds; and that May 17, 1875, Speiden purchased from him $20,000 of 3.65 bonds of the D. C. for $15,000, giving his note for $14,000 and the balance in cash, and leaving the bonds with Davis to secure the note.

That July 2, 1875, the said Speiden bought of said Davis $30,000 more of said 3.65 bonds, giving in payment his notes amounting to $22,425, and leaving the bonds with Davis as security. That June 15, 1875, the interest on the $14,000 note, first given, was paid, and two new notes given for the amount. August 3, 1875, the two purchases were consolidated, the interest paid on notes, and a new note given by Speiden for $32,500, payable in 60 days, and the $50,000 of bonds left as security for its payment. Oct. 6, 1875, the price of bonds declining, the interest was again paid, and the margin made good, by Speiden giving two notes, one for $30,000 and one for $4,000, and leaving to secure the $30,000 note the said $50,000 in bonds and $1,500 of other similar bonds. December 7, 1875, the said $30,000 note was renewed for ninety days, the interest paid, and a new note given for $2,500, being the balance in renewal of the $4,000 note; and the $50,000 in bonds were still left with Davis. These last notes were not renewed, and complainant gave Davis an order to sell the bonds, March 10, 1876, claiming their then market-value to be from 72⅛ to 72¼ per cent. That Davis claimed to have sold the bonds, March 14, 1876, for 66 per cent., but rendered no account. That March 29, 1876, Davis sued Speiden at law for a balance of $120 and interest still unpaid on the said $2,500 note. That complainant never saw the said bonds he had bought and pledged, and he believes that Davis never had them, but perpetrated a gross fraud on plaintiff. If so, he claims to be entitled to recover, not only the moneys paid on account of the transaction, but the highest market value of the bonds at any time before suit brought.

Prayers: 1. For answer, on oath. 2. That Davis be decreed to return the said two notes. 3. That he be decreed to pay plaintiff the said sums so paid on account of said bonds, and the difference between the notes and the highest

market value of bonds to date of bill. 4. That if Davis *had* the bonds, then, that he be decreed to account for their highest market value on the day said notes were due, or the day after. 5. That said suit at law be enjoined, and 6, General relief. (p. 6.)

To this bill a demurrer was filed. (p. 7.)

The demurrer was argued in Special Term, September 8, 1876, and overruled, and ten days given Davis to answer; and restraining order as to suit at law, until final hearing. (p. 8.) From this decree Davis appealed to court in General Term, and filed an undertaking approved by the court. (p. 8.) September 22, 1876, and after said appeal and the filing of said approved bond therefor, the court, in Special Term, on motion of plaintiff's solicitor, entered a decree *pro confesso*, for failure of Davis to answer in ten days; and Nov. 3, 1876, just at the close of the October Special Term, and without any proof whatever, a *final* decree against Davis for $6,601, *with interest from September 1, 1875*. (p. 9.)

The appeal in said cause, then pending and undetermined, not having been reached for hearing, and the final decree being liable to be executed before such hearing could be had, Davis appealed to the General Term from said final decree, and gave an approved bond. (p. 11.)

The first appeal from the decree overruling the demurrer never was reached for hearing; but a number of other similar appeals from decrees overruling demurrers were pending in the same term, and one of them (*Parsons* vs. *Parker*, No. 3,730) was argued, and the court decided, December 18, 1876, that such was not an appealable order under the statute regulating appeals.

Prior to this decision Davis filed a motion in the General Term to vacate both the decree *pro confesso* and *final decree*, which had been entered in *Special* Term, while the

cause was on appeal in the *General* Term, and which motion was overruled. (p. 10.)

After the decision in *Parsons* vs. *Parker*, an application was made by Davis for a re-hearing of his said motion to vacate, whereupon the court in General Term, of its own motion, dismissed the appeal and remanded the cause "*to the Special Term for further proceedings therein.*" (p. 10.)

The cause being thus *remanded* to the Special Term, Davis there appeared, December 30, 1876, and filed a motion to vacate the said decrees made pending the appeal, and for leave to file the answer exhibited. (pp. 11, 12.)

The term having passed, the court doubted its authority to vacate the decrees, on motion, under Equity Rule No. 88, and for that reason overruled the motion. (p. 16.)

The cause being thus in the Special Term, and application made there to set aside the decrees, Davis voluntarily dismissed the appeal from the final decree of Nov. 3, 1876. (p. 11.)

Thereupon, January 4, 1877, Davis filed a bill of review (p. 1), reciting all the aforesaid proceedings, and averring and pointing out errors of law apparent on the record, and annexing his proposed answer to the bill in No. 4,902. (p. 12.) This answer states a complete defence, on the merits, to the case made by the bill, and it embodies the order in writing from Speiden to sell said bonds. (p. 14.)

To this bill of review Speiden demurred. (p. 17.)

The cause thus made up, No. 5,323, came on for hearing, on the demurrer, in Special Term, and, after full argument, the court overruled the demurrer, and granted the plaintiff leave to answer *instanter* in the said cause 4,902, setting aside the decrees complained of. (p. 18.) Davis thereupon filed his answer in 4,902, and Speiden appealed to the court in General Term. (p. 18.)

The court in General Term was of the opinion that there were errors of law on the record, but inasmuch as the

plaintiff had not paid the money so decreed to be paid in the erroneous decree, before filing his bill of review, it would only affirm the chancellor's decree, giving leave to answer in the original suit, upon condition that Davis *now* pay the money into court. (Opinion, p. 19, and decree, p. 24.)

Davis, thereupon, filed an affidavit showing his inability to comply with the terms imposed, and moving the court to so modify the decree as to give him leave to amend his bill, or to let it be dismissed without prejudice. (pp. 24, 25.) This motion, after argument, the court overruled, and thereupon Davis appealed to this court. (p. 25.)

Assignment of Errors.

The errors of law sought to be corrected by the bill of review were—

1. The Special Term had no jurisdiction to proceed with the cause, pending the appeal to the General Term.

2. The final decree was unauthorized *ex parte*, on the face of the bill, without proofs.

3. When the appeal was dismissed, and the cause remanded to the Special Term for further proceedings, the cause should have been proceeded in from the point it had reached when the appeal was taken.

4. The decrees *ex parte* were erroneous, and should have been set aside, on motion, notwithstanding enrollment, no trial having been had on the merits.

The errors committed by the court in General Term, now sought to be corrected by this appeal, are—

1. The court erred in entertaining the appeal.

2. The court erred in requiring the plaintiff, Davis, to pay the $6,601, with interest and costs, as a condition precedent to correcting the errors of law found.

3. The demurrer only raised questions of *law* on the record; and the court erred in holding that it raised any question as to the *terms* which the chancellor, in his discretion, should or should not have imposed on the plaintiff before granting him relief.

4. The court erred in its refusal to modify the decree so as to permit the plaintiff to file an amendment to his bill; or to let the bill be dismissed without prejudice to his right to file a new bill of review.

5. The court erred in sustaining the demurrer to the bill of review.

6. The court erred in dismissing the bill of review.

7. The court erred in reversing and vacating the decree of the Special Term giving Davis leave to answer in No. 4,902.

8. The court erred in refusing to affirm the decree of the Special Term.

Argument.

Both the Special Term and General Term found that there were errors of law which ought to be corrected. 1. The proceeding with the case *ex parte*, while the cause was actually removed to, and then pending in, the appellate court; and 2—the entering of a final decree for a large sum of money, on the vague and uncertain statements of the bill, without proof, even if no appeal was pending. (Rule 15.)

The only question on which they seem to have differed in opinion was as to the *terms* which ought to have been imposed upon Davis, as complainant in bill of review, before the court would undo its erroneous work—the chancellor holding that the errors ought to be corrected *without terms*, other than submitting to speed the cause by answering *instanter*, no trial having been had on the merits; and the appellate court holding that the *chancellor* should have

required payment of the large sum so erroneously decreed to be paid, before correcting the judicial mistakes; and that otherwise he had no *jurisdiction* or *discretion* in the matter. In other words, that the *rule* requiring payment of decree claimed to be erroneous, before setting it aside, was an absolute *iron rule*—that could not be waived or adjusted by the chancellor in each case, according to the peculiar equities of parties, as justice might require; and that the failure to observe it could be taken advantage of by demurrer.

Law Points.

I.

The appeal should have been dismissed, on hearing, because the decree below was substantially a decree setting aside a default, a matter which rested in the discretion of the Chancellor, and was not subject to review in the appellate court.

Philp & Solomon v. *Gardner*, MacA., 165;
Wylie v. *Coxe*, 14 How., 1;
Connor v. *Peugh's Lessee*, 18 How., 394:
Dean v. *Mason*, 20 How., 198;
Lansing v. *Russell*, 2 N. Y., (2 Comst.,) 563;
Thomas v. *Mohler*, 25 Md., 36;
U. S. Exp. Co. v. *Bedbury*, 34 Ill., 459;
Fort v. *Bard*, 1 N. Y., (1 Comst.,) 43–125;
Dufolt v. *Gorman*, 1 Minn., 301;
Lawrence v. *Ely*, 38 N. Y., 42;
Hall v. *Lamb*, 28 Vt., 85;
Millspaugh v. *McBride*, 7 Paige, 509;
Buffington v. *Harvey*, 95 U. S., 99.

The same reasoning which induced the court to dismiss the appeal in No. 4902, would require it to dismiss this appeal, under Sec. 772, R. S., D. C.

This is also a decree overruling a demurrer, and it does not "*involve the merits of the action;*" but only paves the way for a hearing and determination of the controversy on its merits.

Opinion of MacArthur, p. 22.

Appeals in such cases had before been entertained by the Court in General Term, without question, as shown by the following cases:

(No. 3,989, Eq.), *Painter* v. *Drane*, 2 MacA., 163;
(4,118, Eq.), *Creswell* v. *Williams*, Ib., 246;
(Law), *Cluss* v. *Dist. Col.*, Ib., 489;
(13,376, Law), *U. S. use &c.*, v. *Donohue*, Ib., 214.

Believing in the merits of the demurrer in 4,902, counsel took the appeal in good faith, relying on these cases, and what was then supposed to be the recognized practice of the Court. As to merits in that demurrer, in addition to cases cited in record, p. 21, see:

Watson v. *Sutherland*, 5 Wall., 74;
Magee v. *Magee*, 51 Ill., 500;
Winfield v. *Bacon*, 24 Barb., 154;

II.

No appeal lies from a decree in respect to the *terms* which the Chancellor may or may not have imposed. Such matter is discretionary with the Chancellor, and the rule applies to the question of performance of decree before granting relief on bill of review, or of leave to file such bill in cases where such leave is necessary.

Ricker v. *Powell*, 100 U. S. S. C., 104;
Burger v. *White*, 2 Bosw., (N. Y.), 92;
Gale v. *Vernon*, 4 Sandf., (N. Y.), 709;
2 Dan'l Ch. Pr., 1634, *n*;
Thomas v. *Harvie's heirs*, 10 Wheat., 151;
Rubber Co. v. *Goodyear*, 9 Wall., 806;

Taylor v. *Person*, 2 Hawks, (N. C.), 300;
Bank v. *Dundas*, 10 Ala., 661.

III.

The performance of the decree, sought to be reviewed, is not necessary to give jurisdiction to the court in a bill of review; and defendant in such case by demurring, admits the suit to be properly in court, and waives any objection as to non-performance of decree.

Griggs v. *Gear*, 3 Ill., 16, 17;
Horner v. *Zimmerman*, 45 Ill., 14, 22;
Forman v. *Stickney*, 77 Ill., 575.

The demurrer raises only questions of law on the face of the bill.

Mellish v. *Williams*, 1 Vern., 166;
Webb v. *Pell*, 3 Paige, 368;
Willis' Eq. Pl., 483;
Van. H. 2 Eq. Draftsman, 92.

If the complainant, in a bill of review, deny the justice of the demand established by the decree sought to be reviewed, it is equivalent to an averment of performance, or of inability to perform; and especially is this true in a case where no trial has been had on the merits.

Horner v. *Zimmerman*, 45 Ill., 14.

IV.

A bill of review for alleged errors of law apparent upon the face of the record, may be filed as a matter of right, without leave of the court.

Gould v. *Tancred*, 2 Atk., 534, 2 P. Wms., 283;
Griggs v. *Gear*, 3 Ill., 16;
2 Daniel's Chancery Pr., 1,633;
Berry v. *Stockwell*, 10 B. Mun., 299;
Green's Appeal, 59 Pa. St., 235.

V.

If leave had been given to amend or file a new bill, there was ample time to have done so, and inability to pay the money decreed could have been averred, if such an averment was necessary to give the court jurisdiction to correct the errors found.

Thomas v *Harvie's Heirs*, 10 Wheat., 146;
Mauro & Forest v. *Ritchie*, 3 Cranch C. C., 147.

VI.

The rule requiring *performance* of decree has been frequently dispensed with, on security being given; and such is considered the better rule in this country.

Savile v. *Darcy*, 1 Freeman Ch., 172;
S. C., 1 Cas. in Ch., 42;
Stahling v. *Goodloe*, 3 Murph., (N. C.,)159;
Taylor v. *Person*, 2 Hawks., (N. C.,) 298;
Denson v. *Denson*, 33 Miss., 564.

In the case of *Savile* v. *Darcy*, the question was raised by *plea*, and we can find no case where the question of non-performance has been raised by *demurrer*.

It is doubted whether, by any kind of pleading, this objection of non-performance of decree can be made to the bill of review, itself; as the bill does not stay process of execution to compel payment, and the complainant's goods and estate could be taken in execution at any time prior to vacating the decree sought to be reviewed; and, hence, the defendant in review is in no way injured by the filing of the bill for errors of law, and retains all the security he has of judgment and execution, until hearing of the cause in review.

Mitf'd & Tyler's Pl. and Pr. in Eq., 378;
Burch v. *Scott*, 1 Bl., 112, 125;
Mellish v. *Williams*, 1 Vern., 117;
Livingston v. *Hubbs*, 3 Johns. Ch., 124.

VII.

The court had authority, notwithstanding rule 88, to vacate the decree, on motion, after enrollment; and if that had been done no question could have arisen as to the performance of the decree, because the harshest terms which courts impose on granting such a motion would be to require payment of costs, and a speedy plea or answer.

Freeman on Judg'ts, sec 97–100;
1 Nat'l Bank of Wash'n v. *Eccleston*, 48 Md., 145;
Herbert v. *Rowles*, 30 Md., 271;
Millspaugh v. *McBride*, 7 Paige, 509;
2d Dan'l Ch. Pr., 1038–1040–1045;
Stocker v. *Cooper*, 25 Mo., 401;
N. & L. R. R. Co. v. *Stimpson*, 35 N. H., 286;
Page v. *Wallace*, 87 Ill., 84;
Hibbard v. *Muller*, 86 Ill., 256.

Only slight evidence required to open a default and let in a defence, on the merits.

Coffin v. *Abbot*, 7 Mass., 252.

VIII.

The rule in regard to performance of decree, before filing bill of review, was established for the furtherance of justice, and not as an immovable obstruction to justice, binding and cramping the conscience of a chancellor.

A bill of review is usually in a case that has been tried on the merits; and, hence, the presumption is that the decree is just, and ought to be performed; but, in a case of a decree *ex parte*, unauthorized even on the allegations of the bill, there can be no such presumption.

Perry v. *Goodwin*, 6 Mass., 498.

The decree in this case (p. 9) was for more than the payment of money. It required the notes, which were evi-

dences for plaintiff in his suit at law, to be delivered up and cancelled.

The court should not require a vain thing to be done nor an impossible thing. It would be idle to require a litigant to bring into court $7,000, and then to immediately order it to be refunded to him; for the court would have no right to require a defendant to secure a judgment not yet entered, and which depended on the uncertainties of a trial on the facts; and if the money had been paid into court, as ordered, it must have been refunded, on application, as soon as the decree was set aside.

The decree, as shown by affidavit of Davis, only granted relief on terms which it was impossible for him to perform. (p. 25.) A Court of Conscience never imposes such terms as a condition on which it will do an act of justice.

We submit that upon reason and authority, as well as on principles of equity and good conscience, the decree of the court in General Term herein should be reversed, and the cause remanded for further proceedings; that proofs be required in cause 4,902, and the controversy regularly tried on its merits.

JAMES S. EDWARDS &
JOB BARNARD,
Solicitors for Appellant.

SUPREME COURT, U.S.
FILED
APR 16 1881
JAMES H. McKENNEY, CLERK

IN THE

UNITED STATES SUPREME COURT.

No. 286.—OCTOBER TERM, 1880.

CHARLES T. DAVIS, *Appellant*,

vs.

EDGAR SPEIDEN.

BRIEF OF APPELLEE.

Rules of Court Applicable.

Rule 30, page 69, of Equity Rules, provides that, if upon the hearing any demurrer is overruled, the defendant shall be assigned to answer: "in default whereof, the bill shall be taken against him *pro-confesso*, and the matter thereof proceeded in and decreed accordingly."

Rule 16, page 65, provides that, "when the bill is taken *pro-confesso*, the Court may proceed to a decree at the next ensuing term thereof, and such decree rendered, shall be deemed absolute, unless the Court shall, *at the same term*, set aside the same, or enlarge the time for filing the answer upon cause shown, upon motion and affidavit of the defendant."

Rule 88, page 87. No rehearing shall be granted after the term at which the final decree of the Court shall have

been entered and rendered, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the Court.

Rule 2, Terms of Court, the *Special Term*. First Tuesday of every month, save August, in wh ch month there is no court.

Rule 91, providing for an appeal to the General Term, requires that the appeal shall be taken and perfected within thirty days, and that the appellant, with one surety or more to be *approved by the Court*, or one of the Justices, shall file an undertaking.

Rule, 16, provides that, "no such approval shall be made, save upon affidavit of two days' notice of application for such approval to the opposite party in interest; and without such notice, no such approval shall be operative, and such notice shall contain the name and address of the proposed surety."

Argument.

The original bill, now sought to be reviewed, was demurred to for want of jurisdiction in equity, notwithstanding it alleged acts of the grossest fraud by the Defendant, was based upon matters of pledge and trust, and sought to enjoin proceedings at law.

It was apparent that such a demurrer could not be sustained. It was overruled by the court and time given the defendant to answer. Instead of answering, he appealed, filing an undertaking in form required by rule of court but void under Rule 116 for want of notice to the complainant of the proposed surety. Pending this appeal, after the time for answering had elapsed, a decree *pro confesso* was passed which, at the next term of court, was made absolute, and a final decree made for the precise amount of money which,

it appeared from the face of the bill, the defendant had fraudulently received from the complainant.

The defendant's appeal from the order overruling his demurrer was dismissed by the Court in General Term because it was not an appealable order.

The defendant also appealed from the final decree; but instead of prosecuting that appeal, for which he had given security satisfactory to the plaintiff, and on which he could have obtained the opinion of the court on all the alleged errors of law on which he now relies, in order to save his surety, he voluntarily dismissed that appeal, and after an unsuccessful attempt to open the decree against him, on motion, long after the term of court at which it had been passed had expired, he filed this bill of review for alleged errors of law without either performing the decree by paying the specific sum decreed against him, or showing any inability to pay or secure it, or asking the permission of the court to file it without paying.

There was no error in the final decree in the original cause, pending the appeal. Section 772 U. S. Rev. Stat., D. C., gives the right of appeal from any order, judgment, or decree, "if the same involve the merits of the action or proceeding." Instead of waiving his right to time to answer, and standing on his demurrer, so that the court could then have passed a final decree, the defendant in the original bill appealed from the decree which gave him time to answer, and thus avoided a decree on the merits of the action.

The court below, as appears from appellant's brief, in the first case in which the point was made, decided that a decree overruling a demurrer and assigning time to answer, did not involve the merits of the action. It is quite patent that a decree which gives a defendant an opportunity to answer as to the merits is not a decree which, under the statute, involves the merits of the action.

The approval of the undertaking, filed with the appeal, was a nullity under Rule 116 of the court below. An appeal, even from an appealable order, does not stay proceedings below.

3 John. Ch. 160; *Riggs* vs. *Murray*.

In 1 Bland, 15 (Ringgold's case), the Court says: "It has long been the established practice of the Court of Chancery to consider an appeal as, in no case, having the effect of suspending its proceedings, unless an order for that purpose is made by the court itself, or unless in special cases the appellate court should interpose by a special order."

There was no error in the court overruling the motion to set aside the decrees *pro confesso* in the original cause.

After the expiration of the term at which it was passed, a decree cannot be vacated on petition or motion.

3 Wh., 591; *Cameron* vs. *McRoberts*;
12 Pet., 491; *Sibbold* vs. *U. S*;
6 How., 31; *Bank of U. S.* vs. *Moss*;
8 Pet., 262; *Bank of U. S.* vs. *White*;
18 How., 511; *McMicken* vs. *Perin*;
22 Wall., 60; *Putnam* vs. *Day*;
1 Otto, 149; *Roemer* vs. *Simon*;
1 Wood & Mi., 62; *Jenkins* vs. *Eldridge*.

This was not the case of an ordinary default for want of appearance and answer.

The defendant appeared by counsel, who managed his case as they saw proper. No case can be found sustaining a Bill of Review because counsel made a mistake in the management of the cause. The case cited from 22 Wall. is an authority to the contrary.

A Bill of Review for error apparent must be filed within the time allowed for an appeal.

7 G. & J., 207; *Barrett* vs. *Oliver*;

1 Md. Ch. 455; *Pfiltz* vs. *Pfiltz*;
Story's Eq. Pl., sec 410.

If the decree is for the payment of money, it must be paid before the bill ot review is filed; or at least secured to be paid.

Story's Eq. Pl., sec. 406;
Mit. & Tyler's 185;
2 2 Dan. Ch., Pr. 1631;
2 John Ch. 488; *Wiser* vs. *Blackley*;
10 Otto, 104; *Ricker* vs. *Powell.*

This principal is conceded by the appellant in this cause, but he claims that by demurring the defendant admits the suit to be properly in court, and waives any objection as to non-performance of decree.

The fact that the demurrer is special, for the very reason that the suit is *not* properly in court, and because the original decree has *not* been performed, ought to be a sufficient answer to this claim.

He relies upon the three Illinois cases cited in his brief as authority.

In the case in 3d Ill., the bill was held to be a bill in the nature of a Bill of Review to vacate a decree for fraud, and that the fraud shown was sufficient to open the decree. The bill further alleged the inability of the plaintiff to perform the decree, which was for the payment of $36,000.

In the case in 45th Ill., the defendant, in the Bill of Review, answered and went to a hearing on the merits. The point was not made below.

It appears from the report of the case in 77th Ill., that a general demurrer was put into the bill.

The dearth of authority on this special point seems to be owing to the fact (as will appear from an examination of the cases cited) that so well known and firmly established

is this rule of performance that plaintiffs, in Bills of Review, have either shown inability to perform on the face of the bill; or, on proper showing to the court, have obtained leave of court to file without performance or on giving security.

On principle and analogy, this objection of non-performance may be raised by a demurrer, assigning it as a special cause.

Story's Eq. Pl., Sec. 634, in speaking of a Bill of Review for error apparent, says: "the Books of Practice contain "the forms of a demurrer only to such a bill."

Van Hey's Eq. Dr., p. 637, (3d Am. Ed.) gives the form of demurrer to a Bill of Review for newly discovered matter, on the ground that leave of court was not had to file the bill.

It is a well-known rule that the Statute of Limitations must be pleaded, and yet the principle is firmly established that the objection that the case presented by the bill is within the Statute of Limitations at law may be taken by demurrer, and if the plaintiff be within any exception of the statute, he must state it in his bill. Story's Eq. Pl., Sec. 484.

It is not necessary to plead that the Bill of Review is not filed within the proper time. It ought to appear on the face of the bill.

2d Dan. Ch. Pr., 1,629, Note 5, American cases cited;
Story's Eq. Pl., Sec. 635;
10 Wh., 146: *Thomas* vs. *Harvis' Heirs.* In this case the point was decided on demurrer.

A bill brought contrary to the usual practice or course of the court is subject to demurrer.

Story's Eq. Pl., Sec. 632–643 *et seq.*

In 5 Otto, 99, *Buffington* vs. *Harvey*, this court says—

should a bill of review set out the evidence in the original cause, a demurrer, specially assigning that error, should be sustained, or the evidence might, on motion, be stricken out.

On the appeal which the present appellant took from the final decree against him, in the original cause, he could have obtained the opinion of the court below in General Term as to any errors in said decree. This appeal he voluntarily dismissed, and filed his bill of review without either performing the decree, or pretending to show any the slightest reason for non performance.

It is respectfully submitted that the decree below should be affirmed.

W. F. MATTINGLY,
Solicitor for Appellee.

14—88

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~301.~~ 57

CAROLINE KLEIN, APPELLANT,

vs.

THE NEW YORK LIFE INSURANCE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 19, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 301.

CAROLINE KLEIN, APPELLANT,

vs.

THE NEW YORK LIFE INSURANCE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court rooms in the city of Chicago, in the district aforesaid, before the judges thereof, on Saturday, the second day of May, in the year of our Lord one thousand eight hundred and seventy-four, and of our Independence the ninety-eighth year.

WILLIAM H. BRADLEY, *Clerk.*

CAROLINE KLEIN
v.
THE NEW YORK LIFE-INSURANCE COMPANY. } In chancery.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the sixth day of November, A. D. 1872, in the record of the proceedings of the circuit court of the United States for the northern district of Illinois, at Chicago, in the district aforesaid, in said entitled cause, before the honorable Henry W. Blodgett, district judge, is the following entry, to wit:

2 CAROLINE KLEIN
vs.
THE NEW YORK LIFE INSURANCE COMPANY. } Chancery.

By agreement of the parties by their solicitors leave is given the complainant to file in place of the original bill heretofore filed herein, and destroyed by fire on the ninth of October, eighteen hundred and seventy-one, a copy of the same; and it is ordered that said copy be substituted for and have the same effect as the original so destroyed, and thereupon the defendant files its answer herein.

On the same day, to wit, the 6th day of November, A. D. 1872, said complainant, by Mess's. Barber and Lackner, her solicitors, filed in the office of the clerk of said court her bill of complaint in said entitled cause, which said bill of complaint is in the words and figures following, to wit:

Bill of Complaint.

3 In the superior court of Cook County, State of Illinois.

To the honorable the judges of said court in chancery sitting:

Humbly complaining, showeth unto your honors, your oratrix Caroline Klein, that she is the widow of Frederic W. Klein, late of the city of Chicago, Cook County, Illinois, who departed this life on or about the 18th day of March, A. D. 1871, at said city of Chicago, Cook County, Illinois.

And your oratrix further shows unto your honors that heretofore, to wit, on the first day of September, A. D. 1866, at said city of Chicago, the New York Life Insurance Company, a corporation duly organized & existing under & by virtue of the laws of the State of New York, did make, execute, & deliver to said Frederic W. Klein a certain contract in writing, commonly called a policy of insurance, in & by which it, said company, did assure the life of said Frederic W. Klein in the amount of five thousand dollars ($5,000) for the term of his natural life, commencing on the first day of September, A. D. 1866, at noon; and the

said company in & by its said policy of insurance did promise and agree to and with the said Frederic W. Klein, his executors, administrators and assigns, well & truly to pay or cause to be paid the said sum of five thousand dollars to your oratrix or her legal representatives within sixty days after due notice and proof of the death of the said Frederic W. Klein, your oratrix being then and there the lawful wife of said assured.

And your oratrix further shows unto your honors, and alleges the fact to be, that said policy of insurance was made & delivered as
4 aforesaid in consideration of the representations contained in the application therefor, and of the sum of eighty-six dollars & fifty cents therein recited to have been paid by your oratrix to said company, & of the further sum of eighty-six $\frac{50}{100}$ dollars to be paid by your oratrix on the first day of March, A. D. 1867, and of the annual premium of one hundred & seventy-three dollars & fifty cents to be paid by your oratrix semi-annually, in like manner & sums, on or before the first days of September and March in each and every year during the continuance of said policy.

And your oratrix further shows unto your honors that said New York Life Insurance Company, both by the terms of its charter and the laws of the State of Illinois, had full power and authority to make, execute, & deliver said policy of insurance, & the same was in all respects a legal & valid contract upon the part of said company.

And your oratrix further shows unto your honors that said policy was procured by her said husband Frederic W. Klein for the use and benefit of your oratrix, but without the knowledge of your oratrix, & your oratrix never was advised or knew of the terms or import of said policy of insurance until the death of her said husband as hereinafter set forth.

And your oratrix further shows unto your honors that in and by said policy of insurance it was provided, among other things, that in case your oratrix should not pay the said premium sums on or before the several days therein mentioned for the payment thereof, together with any and all interest that might be due thereon, then and in every
5 such case the said company should not be liable for the payment of the sum assured or any part thereof, and the said policy should cease and determine.

And your oratrix further shows unto your honors that Frederic W. Klein paid to said New York Life Insurance Company all the premium sums maturing and becoming payable by the terms of said policy prior to the first day of March, A. D. 1871; that the premium maturing & becoming payable on said last-mentioned day was not paid by said Frederic W. Klein nor by your oratrix, & that by the strict terms of said policy the same thereupon became forfeited & of no force or effect by reason of such default or failure to make payment of said premium sum as aforesaid.

And your oratrix further shows unto your honors, and alleges the fact to be, that said Frederic W. Klein intended to pay the said semi-annual premium maturing and becoming payable on the 1st day of March, A. D. 1871, & undoubtedly would have done so but for his accidental sickness hereinafter set forth.

And your oratrix further shows unto your honors, and alleges the fact to be, that afterwards, to wit, on or about the first day of February, A. D. 1871, the said Frederic W. Klein was taken ill with an attack of . That he was thereupon prostrated & confined to his bed with such illness, where he languished until on or about the 18th day of March, A. D. 1871, at which time he died; that for at least three weeks

prior to the 1st day of March, A. D. 1871, & from that time until his death, he, the said Frederic W. Klein, was, in consequence of such illness, wholly deranged & out of his head with delirium, and wholly unfit for & incapable of attending to any matter of business.

6 And your oratrix further shows unto your honors and alleges the fact to be that said Frederic W. Klein solely by reason of his aforesaid illness & derangment consequent thereon failed to make payment of said semi-annual premium so becoming due & payable on the first day of March, A. D. 1871.

That your oratrix being ignorant of the character and purport of said policy of insurance also failed to make such payment; that no notice was ever given your oratrix by the said New York Life Insurance Company, of the terms, character, or import of said policy of insurance or of the maturing of said semi-annual premium or demand made upon your oratrix for the payment at any time of said semi-annual premium payable on the said first day of March, A. D. 1871, nor was your oratrix ever advised by hersaid husband of the character, terms, or imports of said policy of insurance, & that had your oratrix been advised thereof she would have paid the said semi-annual premium at the maturity thereof; that shortly after the death of said Frederic H. Klein your oratrix for the first time became advised of the existence, nature, character, & import of said policy of insurance.

That thereupon your oratrix caused to be prepared & delivered to the said New York Life Insurance Company due proof of the death of said Frederic W. Klein, in conformity to the terms and requirements of said policy of insurance & then & there, to wit, at Chicago, in said county of Cook, offered to pay to said New York Life Insurance Company the said sum of eighty-six & $\frac{50}{100}$ dollars as and for the semi-annual premium becoming payable by the terms of said policy on the 1st day of

7 March, A. D. 1871, & which said sums she has ever been & still is ready and willing to pay; that said company declined & refused to receive said sum of money and alleged that said policy had, by reason of the non-payment of said semi-annual premium so maturing on the first day of March, A. D. 1871, as aforesaid, become null and void & wholly inoperative & the said company has ever since refused & neglected to pay the said sum of money in said policy of insurance mentioned or any part thereof to your oratrix, agreeably to the terms thereof, although often requested so to do, & wrongfully & unjustly insists upon a forfeiture of said policy for the non-payment of said semi-annual premium maturing on the first day of March, A. D. 1871.

And your oratrix shows & alleges the fact to be that the default upon her part was owing entirely to her want of knowledge as to the stipulations contained in said policy of insurance & that the default upon the part of her said husband was accidental & wholly attributable to his unforeseen & unfortunate illness and that her said husband was abundantly able to pay said sum & was most undoubtedly only prevented from so doing by his derangement of mind as aforesaid.

And your oratrix further shows unto you honors that she had well hoped that said New York Life Insurance Company would comply with the reasonable demands of your oratrix in the premises & would pay to your oratrix the amount stipulated in said policy of insurance, in accordance with the terms thereof. But now so it is, the said defendant the New York Life Insurance Company contriving how to injure your ora-

8 trix & to evade the obligations of said policy of insurance, wrongfully insists that said policy of insurance has become null & void

& wholly inoperative, which your oratrix alleges to be in the highest degree contrary to equity & good conscience.

In tender consideration whereof & inasmuch as your oratrix is remediless at & after the strict rules of the common law & can only have relief in a court of equity, to the end therefore that said New York Life Insurance Company may be prevented from insisting upon & taking advantage of the alleged forfeiture of said policy of insurance, & that your oratrix may be relieved from said alleged default upon her part & the accidental default of said Frederic W. Klein in the non-payment of said semi-annual premium maturing on the first day of March, A. D. 1871, & that said New York Life Insurance Company may be decreed to pay to your oratrix the said sum of five thousand dollars, with interest thereon from the time when the same became payable by the terms of said policy, less the amount of said unpaid semi annual premium, & that your oratrix may have such other & further relief in the premises as shall be just and agreeable to equity, may it please your honors to grant unto your oratrix the people's writ of summons issuing out of and under the seal of this honorable court, directed to said New York Life Insurance Company, commanding it to be and appear before this honorable court upon the first day of the next term thereof, then & there to answer all & singular the matters herein contained & to stand to & abide by what your honors shall adjudge & decree in the premises, as agreeable to equity & good conscience.

CAROLINE KLEIN.

BARBER & LACKNER,
Complt's Sol's.

9 (Endorsed:) Filed Nov. 6, 1872, Wm. H. Bradley, cl'k.

And on the same day, to wit, the 6th day of November, A. D. 1872, said defendant by Messrs. Beckwith, Ayer and Kales, its solicitors, filed in said clerk's office its answer in said entitled cause; which said answer is in the words and figures following, to wit:

Answer.

10 In the United States circuit court for the northern district of Illinois. In chancery.

The answer of the New York Life Insurance Company defendant to the bill of complaint of Caroline Klein, complainant.

This defendant, reserving to itself all right of exception to the said bil of complaint, for answer thereto, saith:

1. It admits that the said complainant Caroline Klein is the widow of Frederick W. Klein, late of the city of Chicago, Cook County, Illinois, who departed this life on the 18th day of March, A. D. 1871.

2. It admits that heretofore, to wit, on the first day of September, A. D. 1866, it, the said New York Life Insurance Company, a corporation duly organized and existing by and under the laws of the State of New York, did make, execute, and deliver to the said Frederic W. Klein a certain policy of insurance, thereby assuring the life of the said Frederic W. Klein in the amount of five thousand dollars for the term of his natural life, commencing on the first day of September, A. D. 1866, at noon, upon the terms and subject to the conditions mentioned in the said policy, a true copy of which said policy is herewith filed, marked Exhibit A, and to which this defendant refers for full information respecting the terms and provisions thereof.

3. It admits that the said policy of insurance was made and delivered as aforesaid, in consideration of the representations made to the said company in the application for said policy, and of the sum of
11 eighty-six dollars and fifty-six cents therein recited to have been paid to said company by the said Caroline, wife of the said Frederick W. Klein, and the further sum of eighty-six dollars and fifty cents to be paid on the first day of March, A. D. 1867, and of the annual premium of one hundred and seventy-three dollars to be paid semi-annually, in like manner and sums, on or before the first day of September and March in every year during the continuation of the said policy.

4. And this defendant further in this behalf saith, that it was expressly provided, understood, and agreed in and by the said policy that in case the said Caroline Klein should not pay the said premiums on or before the several days therein mentioned for the payment thereof, together with any interest that might be due thereon, then, and in every such case, the said company should not be liable for the payment of the sum assured, or any part thereof, and the said policy should cease and determine; and it was therein and thereby further provided and agreed that in every case when the said policy should cease, or become or be null and void, all previous payments made thereon should be forfeited to the said company.

5. It admits that it, the said New York Life Insurance Company, had full power and authority, by the terms of its charter and by the laws of the State of Illinois, to make, execute, and deliver the said policy of insurance in manner and form as the same was made, and that the same was in all respects a legal and valid contract.

6. It admits that the said policy of insurance was procured for the use and benefit of the said Caroline Klein, to whom, or in the case
12 of her death before the decease of her said husband, to whose children the said sum assured was thereby made payable; but this defendant denies, upon information and belief, that the said policy was procured without the knowledge of the said complainant; and that she was never advised or knew of the terms or import of the said policy of insurance until the death of her said husband, as alleged in said bill; to the contrary thereof, this defendant avers that the application for the said policy, a copy whereof is annexed to the copy of the said policy filed herewith, marked Exhibit A, purports to be signed by the said complainant; and this defendant alleges, upon information and belief, that the said complainant had actual personal knowledge of the existence of said policy, and that the same was procured for her benefit at the time the said policy was issued, and that she well knew, or might and ought to have known the terms and provisions thereof, and is chargeable with full notice of the same.

7. It admits that all the premium sums maturing and becoming due by the terms of the said policy, prior to the first day of March, A. D. 1871, were paid to the said company, but whether the same were paid by the said Frederic W. Klein, or by the said complainant, this defendant is unable to state, and it therefore neither admits nor denies the averment in that behalf made in the said bill of complaint.

8. It admits that the semi-annual premium of eighty-six dollars and fifty cents, falling due by the terms of the said policy on the first day of March, A. D. 1871, was not paid either by the said Frederic W. Klein or by the said complainant, nor was the same paid, or offered to
13 be paid, by any other person for or on behalf of the said Frederic W. Klein, or the said complainant, but default was made in the payment of said semi-annual premium, and by reason of such default the

said policy thereupon ceased and determined and became of no force or effect.

9. And this defendant further saith it has never heard or been informed, save by the said complainant's said bill, and cannot state whether the said Frederic W. Klein intended to pay the said semi-annual premium which became due on the first day of March, A. D. 1871, nor whether on or about the first day of February, A. D. 1871, the said Frederick W. Klein was taken ill and confined to his bed; nor whether, in consequence of such illness, the said Frederic W. Klein was for three weeks prior to the first of March, A. D. 1871, and from that time until his death, deranged and incapable of attending to business, nor whether it was by reason of such alleged sickness and derangement that he failed to make payment of the said semi-annual premium; but this defendant is an utter stranger to all and every such matters, and it doth and will insist that the several matters aforesaid are wholly immaterial and furnish, even if true, no legal excuse for making default in the payment of the said semi annual premium.

10. It denies, upon information and belief, that no notice was ever given to the said complainant of the terms, character, or import of the said policy of insurance or of the maturing of the said semi-annual premium, as alleged in said bill of complaint; but this defendant doth and will insist that it is wholly immaterial, so far as respects the lia-
14 bility of this defendant upon the said policy, whether such notice was given or not.

11. It admits that the said complainant gave notice to its agent of the death of the said Frederick W. Klein, and also delivered to such agent proofs of such death; but this defendant denies, upon information and belief, that the said complainant ever at any time offered to pay the said sum of eighty-six and $\frac{50}{100}$ dollors as and for the annual premium falling due on the first day of March, A. D. 1871.

12. It admits that it has refused to pay the amount assured upon the life of the said Frederic W. Klein to the said complainant, and it alleges and insists that by reason of the aforesaid default in the payment of the semi-annual premium, which became due on the first day of March, A. D. 1871, it is under no obligation, either legal or equitable, to pay the same, and that no suit can be maintained by the said complainant against this defendant, either at law or in equity upon the said policy.

13. And this defendant submits to this honorable court that the said complainant hath not by her said bill made such a case as entitles her, in a court of equity, to any relief from or against this defendant touching the matters contained in the said bill, or any of such matters; and it further submits to this honorable court that all and every the matters in the said complainant's bill mentioned and complained of are matters which may be tried and determined at law, and with respect to which the said complainant is not entitled to any relief from a court of equity.

15 And this defendant hopes it shall have the same benefits of these defences as if it had demurred to the said complainant's bill. And this defendant denies all and all manner of unlawful conduct, wherewith it is by the said bill charged, without this, that there is any other matter, cause, or thing in the said complainant's said bill of complaint contained material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided, or denied, is true, to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court

shall direct, and humbly prays to be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained.

THE NEW YORK LIFE INS. CO.,
By O. P. CURRAN,
Its Attorney in Fact.

BECKWITH, AYER & KALES,
Sol'rs for Defendant.

(Endorsed:) Filed Nov. 6, 1872. Wm. H. Bradley, clerk.

16 EXHIBIT A.

Number 38047. THE NEW YORK LIFE INSURANCE COMPANY. Amount, $5,000.

(Copy.)

[50 c. U. S. rev. stamp, cancelled.]

Annual premium, $173. By this policy of insurance, in consideration of the representation made to them in the application for this policy, and of the sum of eighty-six dollars and fifty cents to them in hand paid by Caro-
Payable semi-annually. line, wife of Frederick W. Klein, and the further sum of eighty six dollars and fifty cents, to be paid on the first day of March next, and of the annual premium of one hundred and seventy-three dol-
$86.50. Sep. 1. lars and cents, to be paid semi annually in like manner and sums as above stated on or before the first days of Septem-
86.50. Mar. 1. ber and March in every year during the continuance of this policy, do assure the life of Frederick W. Klein, saloon keeper of
Age 42. Chicago, in the county of Cook, State of Illinois, in the amount of five thousand dollars, for the term of his natural life, commencing on the first day of September, 1866, at noon.

And the said company do hereby promise and agree to and with the said assured, his executors, administrators, and assigns, well and truly to pay, or cause to be paid, the said sum assured to the said Caroline Klein, or her legal representatives, within sixty days after due notice and proof of interest (if assigned or held as security), and of the death of the said Frederick W. Klein.

17 And in case of the death of the said Caroline Klein before the decease of the said Frederick W. Klein, the amount of the said insurance shall be payable after her death to her children for their use, or to their guardian, if under age, within sixty days after due notice and proof of the death of the aforesaid Frederick W. Klein, as aforesaid, deducting therefrom all notes or credits for premiums on this policy unpaid at that time, together with any balance of the year's premium remaining unpaid: Provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the assured upon these express conditions, that in case the said Frederick W. Klein shall, without the consent of this company, previously obtained and endorsed upon this policy, pass beyond the settled limits of the United States (except into the settled limits of the British provinces of the two Canadas, Nova Scotia, or New Brunswick), or shall, without such previous consent thus endorsed, visit or reside in those parts of the United States which lie west of the 100th degree of west longitude, or between the 1st of July and the 1st of November in the city of Memphis, Tenn., or in those parts of the United States which lie south of the southern boundaries of the States of North Carolina and Tennessee,

or shall enter upon a voyage on the high seas, or be engaged in the manufacture of gunpowder or fireworks, or in submarine operations or mining, or as a mariner, engineer, fireman, conductor, or laborer in any capacity upon service on sea, sound, inlet, river, lake, or railroad, or enter into any military or naval service whatsoever (the militia
18 not in actual service excepted), or if he shall die upon the high seas, or in case he shall die by the hand of justice, or in, or in consequence of, a duel, or in violation of any law of these States, or of the United States, or of the said provinces, or of any other country which he may be permitted, under this policy, to visit or reside in, or in case his death shall be caused by intoxicating drink or opium, then this policy shall be null, void, and of no effect.

(On the margin:)

All receipts for premiums are to be signed by the president or actuary. Agents for the company are not authorized to make, alter, or discharge contracts, or waive forfeitures.

And it is also understood and agreed by the within assured to be the true intent and meaning hereof, that if the declarations made by or for the said Caroline Klein in the application for this policy, or any part thereof, and bearing date the twenty-seventh day of August, 1866, and upon the faith of which this policy is made, shall be found in any respect untrue, then, and in such case, this policy shall be null and void, or in case the said Caroline Klein shall not pay the said premiums on or before the several days hereinbefore mentioned for the payment thereof, together with any interest that may be due thereon, then, and in every such case, the said company shall not be liable for the payment of the sum assured, or any part thereof, and this policy shall cease and determine.

And it is further agreed by the within assured that in every case Examined. where this policy shall cease or become, or be null or void, all previous payments made thereon shall be forfeited to the said company, and that if assigned a copy of the assignment shall be given to this company.

19 In witness whereof the said New York Life Insurance Company have, by their president and actuary, signed and delivered this contract this first day of September, one thousand eight hundred and sixty-six.

(Signed) MORRIS FRANKLIN,
President.

(Signed) WM. H. BEERS,
Actuary.

Wife policy; semi-annually. E'd August, 1862.

20 *Application to the New York Life Insurance Company, office Nos. 346 and 348, Broadway, New York.*

Particulars required from persons proposing to effect insurance on lives in this company, and forming the basis of the contract.

NO. OF POLICY.

1. Name (in full) of the party whose life is proposed to be insured.—Frederick W. Klein.

2. Present residence.—Chicago, in the county of Cook, in the State of Illinois.

3. Profession or occupation.—Saloon keeper.

4. Place and date of birth.—Germany, 1824, Sep. 23.
5. Age next birthday.—42. Office age, 42.
6. I' said party married or single?—Married.
7. Are the habits of said party at the present time, and have they always been, sober and temperate?—Yes.
8. Has the party had yellow fever; if so, when, where, and who was the medical attendant?—No.
9. Has the party had the small-pox, or been vaccinated (state which)?—Vaccinated.
10. Is the party subject or predisposed to dyspepsia, dysentary, diarrhœa, or any other disease or bodily infirmity?—No.
21 11. Has the party had, or been afflicted since childhood with, any of the following complaints? Separate answer required to each query:
Diseases of the lungs, or pulmonary complaints?—No.
Spitting or raising of blood?—No.
Rupture?—No.
Fits, or convulsions?—No.
Insanity?—No.
Rheumatism?—No.
Dropsy?—No.
Bronchitis?—No.
Fistula?—No.
Bilious colic?—No.
Paralysis?—No.
Apoplexy?—No.
General debility?—No.
Spinal disease?—No.
Gout?—No.
Cancer?—No.
Scrofula?—No.
Eruptions, or diseases of the skin?—No.
Asthma?—No.
Palpitation, or disease of the heart?—No.
Disease of the liver, kidneys, or brain?—No.
Or any serious disease?—No.
12. Has the party ever met with any accidental or serious personal injury?—No.
22 13. Has the party ever been seriously ill? If so, when; with what complaint, and who was the medical attendant? State his name and residence.—No.
14. Is the said party now in good health?—Yes.
15. Has any near relative of said party died of or been afflicted with consumption, scrofula, insanity, gout, or any pulmonary complaint, or any hereditary disease (state particulars)?—No.
16. A. Are the party's parents living? If so, what are their ages?—A. Father's age, living, 73; mother's age, living, .
B. If dead, at what ages and of what diseases did they die?—B. father's age at death, ; cause of death, ; mother's age at death, ; cause of death, old age.
17. How many brothers and sisters has the party had?—3. Brothers, 1; sisters, 2.
18. How many are living, and what are their ages?—2. Brother's age, 40; sister's age, 32.
19. How many of them are dead, and at what ages and of what diseases did they die?

Brothers dead; ages; causes of death:
1.
2.
3.
4.

Sister dead, 1; ages, 34; causes of death:
1 childbed.
2.
3.
4.

23 20. What is the present and general state of health of parties referred to in queries 16 and 18?—In good health.

21. Is the party now insured in this company, or has he ever been? and if so, state Nos. of policies and amount.—No.

22. Has the party any other insurance on his life; if so, where and for what amounts?—Yes; in Germania, for $1,000.

23. Has any proposal to insure the life of said party ever been declined; if so, by what company?—No.

24. Has any proposal or application to insure the life of said party ever been made to any company or agent upon which a policy has not been issued? If so, state full particulars.—No.

25. Has any physician given an unfavorable opinion upon the life of said party with reference to life insurance? If so, state particulars.—No.

26. Where has the party resided (during summer and winter) during the last ten years?—In Chicago.

27. Name and residence of the party's usual medical attendant, or, if having none, of some other medical person to be referred to for information as to health.—Has known said party 10 years—Dr. Sauer.

24 28. Name and residence of an intimate friend not interested in the proposed insurance to be referred to for similar information as to health.—Has known said party 10 years—Mr. Gindle.

29. Sum to be insured, $

30. Premium—how payable, semi-annually—on what table?—Ordinary life.

31. Name, residence, and occupation of the party in whose favor the insurance is proposed, and relationship, if any, to the party whose life is proposed to be insured.—Caroline Klein, Chicago, wife of applicant.

32. Is the party aware that any untrue or fraudulent answers to the above queries, or any suppression of facts in regard to the party's health, will vitiate the policy and forfeit all payments made thereon?—Yes.

I do hereby declare that the age of Fred. W. Klein, above named, does not now exceed 42 years; that he is now in good health, and does ordinarily enjoy good health, and that in the above proposal I have not withheld any material circumstance or information touching the past or present state of health or habits of life of Fred. W. Klein, with which the trustees of the New York Life Insurance Company ought to be
25 made acquainted; and that I have an interest in the life of the said F. W. Klein to the full amount of the said sum of $5.000.

And I do hereby agree that this declaration and the above proposal shall be the basis of the contract between me and the said company, and

that if any fraudulent or untrue allegation be contained therein, or in the proposal, all moneys which shall have been paid on account of such insurance shall be forfeited to the said company, and the policy void. And I further agree that under no circumstances shall the policy be in force until the actual payment to, and acceptance of, the premium by an authorized agent of the company.

Dated at Chicago this 27th day of August, 1866.

(Signed) CAROLINE KLEIN.
F. W. KLEIN.

Witness:
Agent, HENRY H. BARSTOW.

26 Afterwards, to wit, on the 16th day of November, A. D. 1872, said complainant, by her solicitors, filed in said clerk's office her replication in said entitled cause, which said replication is in the words and figures following, to wit:

Replication.

UNITED STATES OF AMERICA,
State of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois. In chancery.

CAROLINE KLEIN
vs.
NEW YORK LIFE-INSURANCE COMPANY. } Bill.

The replication of Caroline Klein, complainant, to the answer of the defendant to the bill of complaint of said complainant filed in this cause.

This repliant, saving and reserving to herself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto says:

That said complainant will aver and prove her said bill true, certain, and sufficient in the law to be answered unto, and that the said answer of said defendant is uncertain and insufficient to be replied unto
27 by this repliant; without this, that any other matter or thing in said answer contained material or effectual in the law to be replied unto, confessed, and avoided, traversed or denied, is true.

All which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and prays as in her said bill of complaint has already been prayed.

BARBER & LACKNER,
Complainant's Sol'rs.

(Endorsed:) Filed Nov. 16, 1872. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 28th day of April, A. D. 1873, in the record of the proceedings of said court in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

CAROLINE KLEIN
v.
THE NEW YORK LIFE-INSURANCE COMPANY. } Chancery.

On motion of the defendant, by its solicitor, it is ordered that the proofs be closed by the twentieth of May next.

28 Afterwards, to wit, on the 19th day of March, A. D. 1874, in the record of the proceedings of said court in said entitled cause, before the Hon. Thomas Drummond, judge, is the following entry, to wit:

CAROLINE KLEIN
v.
THE NEW YORK LIFE-INSURANCE COMPANY. } Chancery.

Now come the parties, by their solicitors, and on motion of complainant's solicitor it is ordered by the court that this cause be set down for hearing upon the pleadings and proofs on file herein.

Afterwards, to wit, on the second day of May, A. D. 1874, in the record of the proceedings of said court in said entitled cause, before the Hon. Thomas Drummond, judge, is the following entry, to wit:

CAROLINE KLEIN
vs.
THE NEW YORK LIFE-INSURANCE COMPANY. } In chancery.

Now come the parties, by their solicitors, and this cause now coming on to be heard upon the bill, answer, pleadings, proofs, and exhibits on file; and after hearing the same and the arguments of counsel, the
29 court dismisses the bill herein for want of equity.

It is thereupon considered, adjudged, and decreed by the court that this cause be dismissed, and that the defendant do have and recover of and from the complainant its costs and charges in this behalf expended, amounting to the sum of dollars and cents, and that execution issue therefor.

And thereupon the complainant, by her solicitors, prays an appeal to the Supreme Court of the United States, which is allowed, upon giving bond in the sum of five hundred dollars, with security to be approved by the court.

And on the same day, to wit, the second day of May, A. D. 1874, said parties, by their solicitors, filed in said clerk's office their certificate of evidence in said entitled cause, which said certificate is in the words and figures following, to wit:

Certificate of evidence.

United States circuit court, n'th dist. Ill.

CAROLINE W. KLEIN
v.
N. YORK LIFE INS. CO. } In chancery.

30 *Complainant's testimony.*

1. Deposition of complainant, Caroline Klein, taken before H. W. Bishop, master, November 27, 1872.
2. Deposition of Joseph Otto, taken before H. W. Bishop, esq., master, November 26, 1872.
3. Deposition of Nicholas Strotz, taken before H. W. Bishop, master, Nov. 27 and Dec. 2, 1872.

4. Deposition of Frederika Listz, taken before H. W. Bishop, master, April 27, 1874.
5. Deposition of Eben. F. Runyall, esq., taken before master, June 24, 1873.

Said depositions taken before the master, filed May 2, '74.

6. Deposition of Elizabeth Morgan, taken before F. W. Klagor, commissioner, Jan. 8, 1874, and filed Jan. 13, 1874.

Defendant's testimony.

1. Deposition of Sidney H. Carney, taken before W. A. Ruff, notary public, April 30, 1873, and filed May 2, 1874.
2. Deposition of O. P. Carran, taken before H. W. Bishop, April 25, 1874, and filed May 2d, 1874.
3. Deposition of George N. Grut, taken before master, April 25, 1874, filed 1874.
4. Deposition of Mason B. Loomis, taken before master, April 27, 1874, filed May 2, 1874.

31 The defendant also read on the hearing the copy of the policy of insurance attached to defendant's answer as Exhibit A. (See page 16.)

(Endorsed :) Filed May 2, 1874. Wm. H. Bradley, clerk.

32 *Complainant's proofs.*

33 In the circuit court of the United States for the northern district of Illinois. In chancery.

CAROLINE KLEIN
vs.
THE NEW YORK LIFE INSURANCE COMPANY.

Testimony taken before Henry W. Bishop, master in chancery of said court.

WEDNESDAY, *Nov'r 27th*, 1872.

Present, the complainant, H. Barber, jr., of counsel for the complainant, no counsel appearing representing the defendant, and Wm. J. Wallise, interpreter.

W. J. Wallise was duly sworn to act as interpreter between the witness hereinafter named and the examiner, the said witness being a German and not understanding the English language.

CAROLINE KLEIN, a witness produced on behalf of the complainant, being first duly sworn, was examined in chief by Mr. Barber, through W. J. Wallise, sworn interpreter, and deposes and says as follows:

Int. 1. Please state your name, age, residence and occupation.

34 Ans. Caroline Klein; age, 39; residence, Chicago, 197 Desplaines street; occupation, none.

Int. 2. Were you the wife of Frederick Klein?

Ans. I was.

Int. 3. When were you married?

Ans. I was married 14 years ago to him.

Int. 4. Where?

Ans. In Chicago.

Int. 4. When and where did he die?

Ans. In Chicago, on the 18th of March, 1871.

Int. 6. How long was he sick during his last illness?

Ans. He was sick about six weeks, more or less.

Int. 7. What was his mental condition during that time?

Ans. Sometimes he spoke sensibly, but always evading direct answers.

Int. 8. Describe to us his condition.

Ans. He didn't want to know anything about business; he didn't care for business either; I had necessary business transactions with him in regarding to looking over documents and papers, but he refused flatly to have anything to do with it. He was all the time subject to severe fever, and the sweat was always running down his body. Sometimes he spoke so I didn't think he was in his senses, in so speaking, but I paid no notice to them.

35 Int. 9. What did you know about his life insurance before his death?

Ans. I did not know about his life insurance before he died; I never paid attention to such matters.

Int. 10. Did he ever explain to you about what life insurance he had.

Ans. He did not. He never told me anything, and I never asked him about it.

Int. 11. Where did he keep his papers?

Ans. He kept them in a wardrobe where he kept his clothes. The life-insurance policy was not with the other papers. His papers were scattered all over.

Int. 12. When did you first learn about the policy in the N. Y. Life Ins. Co.?

Ans. After he was dead; about half an hour after his death Mr. Strotz examined all his papers for the purpose of finding papers that ought to be attended to. Mr. Strotz then found that policy. Mr. Strotz asked me for the last receipt. He said that the receipt was missing. I answered that I didn't know anything about it. Mr. Strotz went to the office of the N. Y. Life Ins. Co. and enquired whether the last premium was paid.

Int. 13. Was that the first you knew about the policy in the N. Y. Life Ins. Co. when Mr. Strotz made examination?

Ans. It was the first I had heard of it.

Int. 14. Was any notice or demand made for the payment of

36 that premium during Mr. Klein's last illness?

Ans. No.

Int. 15. Did you ever go to the company and offer to pay it after your husband's death?

Ans. I did not, but Mr. Strotz did.

Int. 16. What was this business you undertook to transact with your husband you spoke of?

Ans. My husband had some lots in Tell City. A man by the name of Frederick, who keeps a billiard hall on the north side, called on us to receive the last tax receipts on that property. I asked my husband where he kept his papers, and particularly his tax receipts, which Mr. Frederick wanted to see. He refused to have anything to do with it, saying "let me alone."

Int. 17. Can you read, or write, or speak English?

Ans. I cannot; I never had any occasion to.

Int. 18. What were Mr. Klein's circumstances, immediately preceding his death, financially?

Ans. He had money, which was deposited, and other property.

Int. 19. How much money?

Ans. He told me once before he was sick that he had had about 1,000 dollars on deposit.

(Answer objected to as hearsay.)

37 Int. 20. How much did you find after he was dead?

Ans. Mr. Korse was his collector to collect the rents. The money was in the care of Mr. Corse; after my husband's death he brought me about 350 dollars, and told me that that was all coming to Mr. Klein. I told him that I knew from my husband that the funds ought to be about 1,000 dollars, when he told me that was all he had. I don't know who was right about it.

Int. 21. Did he try to settle with *my* husband while he was sick.

Ans. I sent for Mr. Corse, but my husband was unable to settle with him from illness.

Int. 22. How long was this before your husband's death?

Ans. I don't know exactly whether this was 2 weeks or 3 weeks before he died.

Int. 23. Did you go to the life-insurance office at all yourself?

Ans. I went personally to the office of the company several times; my sister went with me to interpret, who speaks good English.

Int. 24. Did you offer to pay this premium after your husband's death?

Ans. I was told in the office that that didn't matter; that they would report to New York and wait for answer.

Int. 25. What answer did you get?

38 Ans. They offered me $600.

Int. 26. How many children did Klein leave?

Ans. Four.

Int. 27. Did anybody else go to the insurance company for you? Mr. Runyon?

Ans. A neighbor went for Runyon, and he went. I did not go.

CAROLINE KLEIN.

Subscribed and sworn to before me this twenty-seventh day of November, 1872.

H. W. BISHOP,
Master in Chancery of the Cir. C't of the U. S. for the Nor. Dist. of Ill's.

MONDAY, *Dec'r 2d*, 1872.

Present as before, and F. H. Kales, esq., counsel for defendants.

Cross-examination of CAROLINE KLEIN by Mr. KALES:

X int. 1. You have testified to what was told you at the company's office in Chicago. Please state whether those conversations were in the English or German language.

Ans. I took an interpreter; on one occasion, my sister; on another, a friend. These conversations were carried on in English,

39 through the interpreters.

X int. 2. Did any of the insurance men speak to you personally in those conversations in the Dutch language?

Ans. No.

X int. 3. Did your husband, to your actual knowledge, have any other money at the time of his death excepting what was in the hands of Mr. Corse?

Ans. He had some money in the house besides what was in the hands

of Mr. Corse, which had been taken in the course of business. It was his practice to deposit with Corse; as his money accumulated it was handed over. At the time of his death there were several hundred dollars—from two to three hundred dollars in the house.

CAROLINE KLEIN.

Subscribed and sworn to before me this 2d day of Dec'r, 1872.

H. W. BISHOP,
Master in Chancery U. S. Cir. Court.

40 In the circuit court of the United States for the northern district of Illinois. In chancery.

CAROLINE KLEIN
vs.
THE NEW YORK LIFE INS. CO.

Testimony taken before Henry W. Bishop, master in chancery of said court.

TUESDAY, *Nov'r 26th*, 1872.

Present, the complainant; H. Barber, jr., of counsel for complainant; Chambers, esq., representing the defendants.

JOSEPH OTTO, a witness produced on behalf of the complainant, being first duly sworn, doth answer as follows to interrogatories propounded by Mr. Barber:

Int. 1. Please state your name, age, residence and occupation.

Ans. 1. Joseph Otto; age, 38; residence, Chicago; occupation, physician.

Int. 2. How long have you been a practicing physician?

A. Eight years.

Int. 3. Where?

Ans. In Chicago.

Int. 4. Did you know Fred'k Klein in his lifetime.

A. Yes.

41 Int. 5. Where did he live?

Ans. Corner of Madison & Jefferson streets in Chicago.

Int. 6. When did he die?

A. On the 18th day March, 1871.

Int. 7. Did you treat him as attending physician in his last illness?

A. Yes, sir.

Int. 8. How long did you treat him?

Ans. About six or seven weeks.

Int. 9. What disease was he afflicted with?

A. Pulmonary consumption.

Int. 10. What was his mental condition during the last six weeks of his life?

A. His mental condition was very deranged; he didn't feel like doing anything. He was sitting still, looking in one place all time. He did'nt attend to any business. He didn't attend to his own business for the last four or five weeks at least. He refused everything that concerned to business. When I came there he answered my questions only by yes and no; when his friends came in he didn't like to see them. He would be alone & not disturbed in any way. If any one was talking to him he would say, "Let me alone, I am sick," and wouldn't enter into conversation with anybody.

Int. 11. Do you recollect what time you were first called in his last illness.

A. I don't recollect exactly.

42 Int. 13. What was his condition for transacting business when you were called to see him first in his last illness?

A. Well, I think he wasn't fit to do any business. Sometimes he felt a little better and then worse, so I didn't see him every day for a time, but in the last six or seven weeks I saw him nearly every day & since that time when he was confined to his room he was not able to attend to any business.

Int. 14. What seemed to be his condition of mind; that of delirium or stupor, or what?

A. It was no delirium; it was stupor.

Int. 15. Was there in your opinion during the whole or any portion of his last illness such a disorder of intellect as to render him incapable of attending to business?

A. Yes; from time to time it was so with him; he forgot shortly after what he was told.

Int. 16. How was his condition, if you recollect, on the 1st of March, or within a few days preceding it in 1871?

A. His condition was worse than it was in the beginning.

Int. 17. Did his condition grow worse from the commencement until his death?

A. Yes.

43 Int. 18. What school are you a graduate of, doctor?

A. Rush Medical College.

Cross-examination reserved.

DR. J. OTTO.

Subscribed and sworn to before me this 26 day of Nov., 1872.

H. W. BISHOP,
Master in Chancery, U. S. Cir. Court.

SATURDAY, *Nov.* 30, 1872—10 a. m.

The witness attended for the purpose of cross-examination and there was no appearance of counsel for defendant.

MONDAY, *Dec.* 2*d*, 1872—2 p. m.

The witness attended for the purpose of cross-examination, and cross-examination was waived by F. H. Kales, esq., solicitor for defendant.

44 In the circuit court of the United States for the northern district of Illinois. In chancery.

CAROLINE KLEIN
vs.
THE NEW YORK LIFE INSURANCE CO.

Testimony taken before Henry W. Bishop, master in chancery of said court.

WEDNESDAY, *Nov'r* 27, 1872, and MONDAY, *Dec'r* 2*d*, 1872.

Present, the complainant in person; H. Barber, jr., of counsel for the complainant.

NICHOLAS STROTZ, a witness produced on behalf of the complainant,

being first duly sworn, doth depose and say as follows, in answer to interrogatories propounded by Mr. Barber:

Int. 1. Please state your name, age, residence and occupation.

Ans. Nicholas Strotz; age, 39; residence, Chicago; occupation, tobacco manufacturer.

Int. 2. Did you know Frederick Klein in his lifetime?

Ans. Yes, sir.

Int. 3. Do you know his wife, the complainant?

45 Ans. Yes, sir.

Int. 4. Where and when did Klein die?

Ans. I think at 81 West Madison street; as far as I recollect, the 18th of March, 1871.

Int. 5. Did you see him during his last illness?

Ans. Yes, sir.

Int. 6. How often?

Ans. Probably once or twice a week.

Int. 7. What was his mental condition during that time?

Ans. His mind was poor.

Int. 8. How poor?

Ans. That he wasn't able to attend to any business.

Int. 9. For how long did this continue before his death?

Ans. Between 4 and 6 weeks.

Int. 10. Did you talk with him any during that time?

Ans. Yes; several times.

Int. 11. Describe how he appeared & acted to you.

Ans. He talked in such a shape that a man in common sense wouldn't talk it. I don't remember the words. He thought he was doing a large business that he wasn't doing.

Int. 12. Was he, in your judgment, out of his head?

Ans. Yes, sir.

46 Int. 13. Did you take him out riding at any time?

Ans. No, sir.

Int. 14. Were you there the day he died?

Ans. Yes, sir.

Int. 15. Did you make any examination of his papers the day he died?

Ans. I did after he was dead.

Int. 16. How did you come to do that?

Ans. I asked Mrs. Klein is she hadn't any papers; to look about; that I heard Mr. Klein was insured somewhere or other Mrs. Klein said she didn't know, she would bring the papers for me to examine. I found amongst his papers two insurances; one was the Germania and the other was the New York Life. I found the policies and all the receipts except the last receipts in the New York one. I asked Mrs. Klein if she didn't know anything about that receipt; she said she didn't know anything about either of the papers.

Int. 17. Where did she get these papers?

Ans. She went into another room and brought a whole lot of papers out. I don't know where she got them from.

Int. 18. How many papers did she bring out?

Ans. A whole bundle; there were leases, deeds, tax receipts; a whole lot of them.

Int. 19. Was this in the room where Klein was lying?

47 Ans. The papers were not.

Int. 20. Do you know whether Mrs. Klein reads or speaks English?

far as I know, she can't.

Int. 21. Did she seem to know what these policies of insurance were, or were you compelled to explain them to her?

Ans. She didn't know. I explained them to her.

Int. 22. Did you go with her to the insurance office?

Ans. I went myself; she didn't go along.

Int. 23. What did you go for?

Ans. I went to see if that last payment was paid or not; that the receipt might have been lost.

Int. 24. Where did you go?

Ans. I think it was on Washington street, between LaSalle & Wells.

Int. 25. At the office of the N. Y. Life?

Ans. At the office of the N. Y. Life.

Int. 26. What did you do there?

Ans. I asked the man there if the last payment was paid on that policy; he said it wasn't, and I asked him why he didn't send a notice for payment. He said he wasn't obliged to do that; that was about all was said.

Int. 27. Did you make any offer on behalf of Mr. Klein to pay it then?

Ans. I think I did—said something about paying it then. Yes, I did.

48 Int. 28. What did the company say to that?

Ans. They said they wouldn't take any money. They asked me if Klein was dead, and I said yes; and they said they wouldn't take any money.

Int. 29. What time was this?

Ans. I think it was the next day after he was dead.

Int. 30. Did you go there at the request of Mrs. Klein?

Ans. Yes, sir.

Int. 31. Do you know anything about Klein's circumstances in life?

Ans. He was worth about 4 or 5,000 dollars.

Int. 32. Was he, in your opinion, at any time during his last illness, incapable of transacting business owing to his mental condition?

Ans. Yes, sir.

Int. 33. How long did it continue before his death?

Ans. From 4 to 6 weeks.

NICHOLAS STROTZ.

Subscribed and sworn to before me this twenty-seventh day of Nov., 1872.

H. W. BISHOP,
Master in Chancery of the Circuit Court of the U. S. for the Nor. Dist. of Ills.

49 MONDAY, *Dec'r 2d*, 1872.

Present as before, and T. H. Kales, esq'r, solicitor for defendants.

Cross-examination of NICHOLAS STROTZ by Mr. KALES:

X Int. 1. Did you go to the office of the ins. co. in Chicago for Mrs. Klein more than once?

Ans. Yes, sir.

X Int. 2. What did you go for the first time?

Ans. To see whether the last payment was made there, and the receipt was lost.

X Int. 3. What took place on that occasion?

Ans. I asked him whether that last payment was made, & he said

no; & I asked him what was the reason they didn't send a notice, and he said they wasn't obliged to do so.

X Int. 4. Did you at that time or any other try to make any of the persons connected with that office believe that you yourself was Klein?

Ans. I did not.

NICHOLAS STROTZ.

Subscribed and sworn to before me this second day of December, 1872.

H. W. BISHOP,
Master in Chancery of the Circuit Court of the United States for the Northern District of Illinois.

Master's fee, including interpreter's fee, 5—$33.50.

50 In the circuit court of the United States for the northern district of Illinois. In chancery.

CAROLINE KLEIN, COMPLAINANT,
vs.
NEW YORK LIFE INSURANCE COMPANY, DEFENDANT.

Testimony taken before Henry W. Bishop, master in chancery of said court.

MONDAY, *April 27th*, 1874.

Present, Hiram Barber, jr., of counsel for complainant; B. F. Ayer, of counsel for defendant, and the witness below named.

FREDERIKA LISTZ, a witness on behalf of the complainant, being first duly sworn, was examined in chief by Mr. Barber, and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.

Ans. Frederika Listz; 45 years of age; residence, 98 Larrabee street, Chicago, Ill.

2. Q. Are you married?

A. Yes, sir.

3. Q. What is your husband's occupation?

A. Tinner.

4. Q. Do you know Mrs. Caroline Klein?

A. She is my sister.

51 5. Q. Do you recollect the time when Mr. Frederic Klein died?

A. Yes, sir.

6. Q. Do you know anything about this claim against the New York Life Insurance Company?

A. Yes, sir; I was along with my sister in the office.

7. Q. When?

A. About two weeks after he died; about ten days. I was there alone once.

8. Q. Was your sister with you the first time?

A. The first time my sister went there with me.

9. Q. What did you go there for?

A. We wanted to know if she could get the insurance.

10. Q. Whom did you see there?

A. An oldish looking man.

11. Q. Did you see Mr. Curran there?

A. I believe I did.

12. Q. What did you have to do with the conversation at the time?
A. I always have to talk for my sister, because she could not talk English.
13. Q. Did you act as interpreter at that time?
A. Yes, sir.
14. Q. Did your sister speak any English at that time?
A. Not a word. "Yes" and "I don't know," she could say.
15. Q. Who did talking on that occasion?
A. I always talked to this gentleman.
52 16. Q. You did the English talking?
A. Yes sir.
17. Q. What was said at that time?
A. He said he sent the notice down to New York and wanted to see about it.
18 Q. Did you go again there?
A. I went alone with Mr. Stroltz.
19. Q. Was your sister with you at that time?
A. I was alone with Mr. Stroltz.
20. Q. Where was this office?
A. On Lasalle street.
21. Q. Whereabouts on Lasalle street?
A. It is not on the corner; second house from the corner.
22. Q. Corner of what?
A. Was it not by the court-house? I cannot tell you the number any more exactly.
23. Q. Are you sure it was on Lasalle?
A. Was it Randolph? Lasalle & Washington, I believe.
24. Q. Was it on Lasalle or on Washington?
A. It was Lasalle, I think. If it was before the fire I always knew. I could find the place now.
25. Q. Lasalle runs north and south and Washington east and west?
A. It was Washington.
26. Q. How many times did you go there?
A. Once I went alone.
27 Q. What did you talk about there?
A. We talked about insurance, and then he said it was not paid,
53 and she was scared half to death because she thought the policy was not paid at the right time.
28. Q. When was the next time you went there?
A. About a couple of days after.
29. Q. Who did you go with then?
A. All alone, because he said we should call and see; in a few days he sent to New York; it was no use for her to go, as she could not talk a word of English.
30. Q. What did you do when you went there alone?
A. I asked if the notice had come from New York, because the gentleman said we should call in a few days again.
31. Q. Did you ever go to Runyan's office?
A. Yes, sir.
32. Q. How many times?
A. Once or twice; I cannot tell how many.
33. Q. With whom?
A. My sister.
34. Q. What did you go for?
A. I always talked for her, for my sister.
35. Q. Did you see the doctor that came here from New York?

A. I saw a gentleman that came to my sister's house; I don't know whether he was a doctor or not; he wanted to know if she wanted to *know if she wanted to* settle; she was not at home; I was sitting down stairs with my father; then she comes in about an hour after. I could not tell if it was a doctor or agent; that is what I could not tell; she was not able at the time to go around; she was kind o' sick.

54 Cross examination by Mr. AYER:

1. X Q. How old is your sister, Mrs. Klein?

A. She is two years younger than me. I guess she is 43.

2. X Q. How long had she been married at the time of her husband's death?

A. About fourteen years.

3. X Q. How long has she lived in Chicago?

About fourteen years, I guess.

4. X Q. Did her husband speak English?

A. Mr. Klein?

5. X Q. Yes.

A. Yes, sir.

6. X Q. Did they have any children?

A. Yes, sir.

7. X Q. How many?

A. Four.

8. X Q. How old is the oldest?

A. He must be 13.

9. X Q. Did the children go to school?

A. Yes, sir

10. X Q. Did they speak English?

A. They must know how.

11. X Q. What was Mr. Klein's business?

A. He had a saloon.

12. X Q. How long had he been in that business?

A. Fourteen years.

13. X Q. How near do you live to your sister?

A. She lived on Madison street and I lived on Larrabee street, about a mile and a half away.

55 14. X Q. Was this office of the New York Life Insurance Company at the corner of Lasalle and Washington streets?

A. I don't believe it was right on the corner; the second house; it was not on the corner.

15. X Q. Which side of Lasalle street was it, the west or the east side?

A. I guess it was the west side.

16. X Q. On which floor of the building was the office?

A. Up stairs, it was.

17. X Q. On the second floor or on the third floor?

A. I guess it was the first floor up stairs.

18. X Q. Do you remember whether it was on the main floor or the second floor?

A. I guess it was the second floor.

19. X Q. How large an office was it?

A. It was a big office.

20. X Q. Was it a front office?

A. No, sir; I could not tell.

21. X Q. You don't remember whether it was a front office or not?

A. I don't believe it was a front office; it was a great big room; there

was an iron stand where the gentlemen always stood; it was a big place.

22. X Q. A great, large room?

A. Yes, sir.

23. X Q. How long did you and your sister remain there on the first occasion that you visited the office?

A. How long we staid there?

24. X Q. Yes.

A. About half an hour.

56 25. X Q. Who did you converse with?

A. It was an oldish-looking man.

26. X Q. Gray-headed?

A. A gray-headed man.

27. X Q. It was not Mr. Curran, whom you see present?

A. I believe it was an oldish man.

28. X. Q. Did you hear his name?

A. I could not tell.

29. X Q. Was his name Carter?

A. I could not tell his name.

30. X Q. Was he a large-sized man?

A. A little larger than you (Mr. Ayer).

31. X Q. Was there any other persons present?

A. No, sir.

32. X Q. He was there all alone?

A. All alone.

33. X Q. Has Mrs. Klein any other sister?

A. No, sir.

34. X Q. Has she any half sister?

A. No, sir.

35. X Q. Do you know Mrs. Elizabeth Morgan?

A. No, sir; Elizabeth Morgan—she used to stay with Mrs. Klein, I believe.

36. X Q. Has Mrs. Klein a sister-in-law?

A. No, sir.

37. X Q. Didn't her husband have any sister?

A. No, sir.

38. X Q. The second time you went to this office you went alone?

A. All alone.

39. X Q. Who did you see, the very same gentleman again?

57 A. Yes, sir.

40. X Q. When you went with Stroltz who did you see?

A. The very same gentleman again.

41. X Q. Do you recollect seeing Mr. Curran, the gentleman present?

A. I don't know.

42. X Q. You don't recognize him?

A. No. I thought I saw him once at Mr. Klein's.

43. X Q. How long have you lived in this country, Mrs. Listz?

A. Twenty-two years.

44. X Q. How long has your sister lived in this country?

A. Fourteen years; she was here a year when she was married—fifteen years.

45. X Q. What year did she come here?

A. I have got it at home in a book.

46. X Q. May it not have been more than fifteen years ago?

A. I' 1856, I think; I could not tell; I could tell you exactly at

home; she was two years here the time of the Washington birth-day celebration the last time, 1856 or 1858.

47. X Q. Were you here in 1857 at the time of the panic, in the fall of 1857, when the banks failed?

A. Yes, sir.

48. X Q. How long had your sister been here at that time?

A. She had just come.

58 Redirect examination by Mr. BARBER:

36. Q. What did your sister have to do with the saloon business?

A. She was not there much.

37. Q. Where did Klein live?

A. In Madison street, over the saloon, up-stairs.

38. Q. He attended to the saloon himself?

A. He attended to it himself.

FREDRIKA LIST.

Subscribed and sworn to before me this 27th day of April, 1874.

H. W. BISHOP,
Master in Chancery, U. S. Cir. Court,
Northern District of Illinois.

59 In the circuit court of the United States for the northern district of Illinois. In chancery.

CAROLINE KLEIN, COMPLAINANT,
vs.
NEW YORK LIFE INSURANCE COMPANY, DEFENDANT.

Testimony taken before Henry W. Bishop, master in chancery of said court.

TUESDAY, *June 24th*, 1873.

Present, Hiram Barber, jr., of counsel for complainant; F. H. Kales, of counsel for defendant, and the witness below named.

EBEN F. RUNYAN, a witness on behalf of the complainant, being first duly sworn, was examined in chief by Mr. Barber, and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.

Ans. Eben F. Runyan; age, 41; residence, Chicago; occupation, lawyer.

Int. 2. Are you a member of the firm of Runyan, Avery, Loomis & Comstock?

Ans. Yes, sir.

Int. 3. Do you know Caroline Klein?

Ans. Yes, sir.

60 Int. 4. Were you ever consulted by her in regard to a claim against the New York Life Insurance Company?

Ans. Yes, sir; some insurance company; I think that was the name.

Int. 5. Do you know Dr. Carney, the adjuster of the N. Y. Life?

Ans. I knew a man who came here as adjuster of the N. Y. Life; I don't remember his name.

Int. 6. Where did you see him?

Ans. I saw him, I think, at my office.

Int. 7. Who was present?

Ans. My impression is that Mrs. Klein was present, and on one occasion that a German named Chatrell, engaged in the leather business directly opposite their place, was with her, and on another occasion a friend of her's, whose name I do not remember.

Int. 8. Was this representative of the ins. co. present?

Ans. He was there twice, and on one occasion Mrs. Klein was there with the leather man, and on the other occasion the other friend, whose name I do not remember.

Int. 9. What was the subject of the conversation at the interviews at your office?

Ans. It was in regard to the life insurance of Mr. Klein in that company, and an effort to obtain a settlement.

Int. 10. What, if anything, was said on either or both of those occasions by Mrs. Klein to the representatives of the company, or any one else, about her knowledge of the existence of the policy on the life of her husband prior to the death of her husband?

61 Ans. She always contended that she knew nothing about it till after his death, one way or the other.

(Question & answer both objected to.)

Int. 11. How did she speak English?

Ans. Poorly, at that time. In fact, it was hard work for me to get much English from her.

Int. 12. How did you communicate with her?

Ans. As a rule, it was through this gentleman, who was almost invariably with her, or Louis Chatrell did the interpreting.

Int. 13. Can you give any reason why this matter is fixed in your mind; if so, what is it?

Ans. After the matter was brought to me to look up I was desirous to have the ins. co. furnish me with the blanks for a proof of loss, and anxious to have a settlement with them. They informed me that the last premium was not paid upon his policy. I advised Mrs. Klein of that fact, and she first thought it must be paid, and afterwards said she knew nothing about it one way & the other, only she found the policy & knew nothing about it. I advised her of this fact before the adjuster came here.

(So much of the answer as relates to the statements of Mrs. Klein is objected to.)

Int. 14. What, if any, conversation took place between Mrs. Klein and this representative of the company at your office at either of these interviews relating to her knowledge of the existence of the policy prior to the death of her husband?

62 Ans. I have no recollection of anything being said by her to him. There was very little conversation between her and him; whatever was said was between this friend of hers and him and myself, and related purely to a settlement with the company.

Int. 15. What was the object of this meeting in your office?

Ans. Purely for the purpose of making a compromise or settlement.

Int. 16. Was Mr. Curran present at either of these interviews?

Ans. I don't recollect ever seeing this gentleman before.

Int. 17. Did you make any offer to the company to pay their unpaid premium while you were conducting the negotiations, or at the time of making proof of loss?

Ans. I don't think I did, personally.

Cross-examination by Mr. KALES:

X Int. 1. How did the interview last to which you have referred?

Ans. They were short; I couldn't tell you the exact time.

X Int. 2. I did not ask the exact time. I would like some idea of the length of time.

Ans. It might have been five minutes, and it might have been ten. I have no distinct idea of the length of time; they were of no great length.

63 X Int. 3. Did Mr. Avery or Mr. Comstock, your partners, participate in any interviews after you had retired from the consultation?

Ans. Not to my knowledge.

X Int. 4. Were you ever informed of their, or Mr. Loomis', participation in any of the interviews with Mrs. Klein at which an agent of the company was present, or said to be present?

Ans. I have no recollection of having any conversation with Mr. Avery or Mr. Comstock in regard to it, but do know that Mr. Loomis had consultations in regard to it. I know that he at different times had consultations with the agents of the company in regard to the insurance of Mr. Klein.

X Int. 5. I infer that you were not present at any of those conversations—is that correct?—between Mr. Loomis and the agent of the company and Mrs. Klein.

Ans. I am inclined to think that I never was. It is possible that Mr. Loomis might have been in the room, but I don't think he was.

X Int. 6. There were interviews, were there not, between Loomis and the agent of the company and Mrs. Klein at the office, or elsewhere, at which you were not present?

64 Ans. I don't know whether Mrs. Klein was ever present with Mr. Loomis at interviews with the agent of the company. I have been told by Mr. Loomis of interviews with the agents of the company, and have always assumed that they were correct.

X Int. 7. May not Mrs. Klein have had interviews at your office with Mr. Carney at which Mr. Loomis may have been present, also, while you were absent, and of which you knew nothing?

Ans. Oh, yes.

X Int. 8. Do you know Mr. Curran, who is now here present, and who was, at the time of the interviews, at your office, and still is an agent of the defendant company?

Ans. I don't know whether I ever saw him before or not. I know that some one was at the office with the gentleman from New York, but whether it was this gentleman or not I can't say. He had very little to say about the matter; most of the talking was done by the other party.

X Int. 9. Do you understand the German or Dutch language?

Ans. No, sir.

X Int. 10. Are you able to communicate with persons speaking the Dutch or German language, but who also speak the English language as indifferently as Mrs. Klein?

(Objected to.)

65 Ans. It is seldom that I come across a German that I can't, in some way, ascertain what he wants, and make myself understood by him, tho' I can't speak a word of the German language. That is from force of habit, and contact with the Germans.

X Int. 11. Can you also understand what that class want, and make such persons understand what you wish to communicate?

Ans. I seldom find a German that I cannot ascertain their desires, and also express myself so as to make them understand what I want.

X Int. 12. Did Mrs. Klein use English words in conversations with you?

Ans. Yes, sir.

X Int 13. Was she able to put together sentences in English?

Ans. I am not prepared to answer that. She talked very broken.

Redirect:

Int. 1. At how many interviews between Mrs. Klein and the gentleman from New York, at your office, were you present?

Ans. My recollection is two.

66 Int. 2. Did you know or hear of any interviews at your office, at that time, between Mrs. Klein and the gentleman from New York, at which you were not present?

Ans. I did not either know or hear of any.

Int. 3. How did Mrs. Klein happen to be present at the first interview?

Ans. My recollection is that I made an engagement with this gentleman from New York, and sent for Mrs. Klein to meet him at that time, & she did so.

Int. 4. How was *in* it in regard to the second interview?

Ans. This is my recollection with regard to that: That I saw this gentleman again after they had met and failed to arrive at a conclusion, and had some talk with him in regard to the matter, and agreed that she should see him again; that I went to Chatrop's place, and had some talk with him, and went with him to see Mrs. Klein, and arranged that she should see him again, and at the time appointed she came over to see him again.

Recross:

X Int. 1. Was Chatrop present with Mrs. Klein at the interview at which you and the New York agent were present?

Ans. My recollection is that he was at one time.

67 X Int. 2. Was anyone else present, according to your recollection, at that interview?

Ans. I have a pretty distinct impression that some one came with the New York man, but am not positive about it.

X Int. 3. What conversation did the New York man have with Mrs. Klein? State, according to your best knowledge and remembrance, what did he say to her.

Ans. He made a proposition to pay her a certain amount as a compromise on the policy; I don't recollect the distinct amount. What I understood from him was this, that the company would rather pay a certain amount than have any trouble about it, and it was left unaccepted when he left.

E. F. RUNYAN.

Subscribed and sworn to before me this 24th day of June, 1873.

H. W. BISHOP,

Master in Chancery Cir. Court U. S., Nor. Dist. Illinois.

(Endorsed:) Filed May 2, '74. W. H. Bradley, cl'k.

68 Deposition of ELIZABETH MORGAN, taken before F. W. Klages, special commissioner, at Utica, in the State of New York, on the eighth day of January, A. D. 1874.

Int. 1. What is your name, age, occupation, and place of residence?

Ans. My name is Elizabeth Morgan; age, thirty-seven years; occu-

pation, housekeeper; place of residence, Deerfield, Oneida County, New York.

Int. 2. Do you know the parties to this suit or either and which of them, and how long have you known them respectively?

Ans. I know the parties to this shit, and have about seven years.

Int. 3. Are you married or single? If married, what is the name of your husband, where does he reside, and what is his occupation?

Ans. I am married; husband's name is George Morgan; he resides in Deerfield, N. Y., aforesaid; his occupation is upholsterer.

Int. 4. Did you ever live in the city of Chicago, Cook County, Illinois? If yea, when and how long did you live there?

Ans. I lived in Chicago, Cook County, Illinois, about six years prior to March, 1872.

Int. 5. Where did you live in the winter and spring of the year A. D. 1871? Give, if you can, the name of the place, street, and number of your residence, if any.

69 Ans. In the winter and spring of 1871 I lived at number 95 West Madison street, Chicago City, Illinois State.

Int. 6. When and where did you first become acquainted with the complainant, Mrs. Caroline Klein, and how long and where have you known her?

Ans. I first became acquainted with complainant the first year I lived in Chicago, at her residence, in that city, and have known her ever since in Chicago.

Int. 7. Did you ever know in his lifetime Mr. Frederick W. Klein, the husband of said complainant? If yea, when, where, and how long were you acquainted with him?

Ans. I became acquainted with Frederick W. Klein at the same time and place that I became acquainted with his wife, the complainant, as answered in the sixth interrogatory above, and I knew him until his death.

Int. 8. Do you know anything about the sickness and death of said Frederick W. Klein? If yea, state fully all you know about it, of your own personal knowledge.

Ans. From the time I first knew Frederick W. Klein I never knew him to be sick until in the summer before he died, when he had a
70 cold and was taken sick. He coughed some, and part of time he was confined to his bed and part of the time he attended to his business. He attended to his business a portion of the time, until in February previous to his death. He was then confined to his bed until the time of his death. His disease was what his physicians and others called quick consumption. I called nearly every day from in February, when he was taken worse, until when he died. I was present, taking care of him, when he died. He died in the morning, at about six o'clock, suddenly.

Int. 9. Did you, at or about the time of the death of Mr. Frederick W. Klein, know anything about a policy of insurance upon his life? If yea, state what you knew about the same, in what company it was, for what amount, and in whose favor it was.

Ans. I knew nothing of any life-insurance policy until after his death. A short time after his death I learned Mr. Klein had an insurance policy on his life, issued by the New York Life-Insurance Company for five thousand dollars, in favor of Mrs. Klein, the complainant herein.

Int. 10. How did you come to know anything about said policy of insurance upon the life of said Frederick W. Klein?

71 Ans. It was found among other papers in his house.

Int. 11. Do you know when and by whom said policy of insurance was found after the death of Mr. Klein? If yea, state all you know in that behalf of your own knowledge.

Ans. A neighbor of Mr. Klein named Nicholas Stratz came in and asked for papers, as Mr. Klein belonged to a lodge of which he was a a member, and he wanted to give notice to that of Mr. Klein's death, and among the papers Mr. Stratz found the insurance policy.

Int. 12. Were you ever present at any interview or interviews between said complainant, Caroline Klein, and any person claiming to be the physician or medical representative of said defendant, the New York Life-Insurance Company? If so, when and where was it, how many interviews were you present at, what was the subject-matter thereof, or what was the name, if you know, of the party claiming to be the physician or the medical representative of said company, and what was said and done by the parties present?

Ans. I was present at an interview between complainant and
72 a person whose name I do not know, who said he was a physician for the New York Life-Insurance Company and had come from New York City expressly to settle up Mrs. Klein's claim. The interview was at the office of the said company in Chicago, on Washington street, in said city. This interview took place during the summer of 1871, I think, but am not positive. I was present at no other interview between said parties or between the complainant and any one representing the defendant. The subject of the interview was the settlement of the complainant's claim upon the aforesaid policy against the defendant.

Int. 13. State, if you know, how such interview or interviews were brought about and who were present, to your knowledge, at each of said interviews, if more than one was had.

Ans. The interview was brought about by Mrs. Klein's receiving a written request or notice to meet some one from the life-insurance company. There was but this one interview had at which I was present. I do not think any one but the physician, the complainant, and myself was present at the interview. Others were working in the building,
which was unfinished; but no one was where he could hear our
73 conversation.

Int. 14. If you were present at any such interview, then state all that you remember of the conversation between said complainant and the party, claiming to be the physician or medical representative of said defendant The New York Life Insurance Company.

Ans. At the interview stated above the physician asked the complainant if she knew there was such a policy, and if she knew anything about it; the complainant answered she knew nothing about any such policy until after Mr. Klein's death. The physician asked why the last premium was not paid. The complainant answered she knew nothing about it; did not know it was due; that if she had known it she would have paid it. She asked why a notice was not sent to pay. The physician replied that they were not obliged to send a notice; that when notices were sent it was only an accommodation on the part of the agent. The physician then said that the company would pay her six hundred dollars to settle the whole matter up, and that if she would not take that
she could get nothing. The complainant said she would not take
74 that. The foregoing is all of the conversation which I remember.

Int. 15. If it shall appear from your answers to the preceding interrogatories that you were present at any such interview or interviews between the parties named, then state what you had to do with

such interview or interviews, how you happened to be present, and in what capacity you acted, and whether the same were conducted in the English language or not, and if not, in what language were the same conducted.

Ans. I went with the complainant at her request. I acted as interpreter for her in the conversation. The conversation was carried on by the complainant in the German language and by the physician in the English language, and I interpreted for them both.

Int. 16. What do you know about the ability of the complainant, Caroline Klein, to speak the English language at the time such interview or interviews were had. If anything, state all you know about it, and how you know it.

Ans. At the time such interview was had the complainant was unable to speak or understand the English language but very little and very imperfectly. I know this from my acquaintance and conversations with her.

75 Int. 17. Do you know any other matter or thing pertaining to the matters in issue in said cause which may be of benefit or advantage to either party. If yea, state the same as fully as if you were thereunto particularly interrogated.

Ans. I know nothing further in relation to this suit or matter.

ELISABETH MORGAN.

76 *Defendant's proofs.*

7 CAROLINE KLEIN }
vs.
N. Y. LIFE INS. CO. }

Testimony taken before notary public, and stipulated to be used.

78 United States circuit court, northern district of Ill. March term, A. D. 1874. In chancery.

CAROLINE KLEIN }
vs.
NEW YORK LIFE INSURANCE COMPANY. }

It is hereby stipulated and agreed by the parties to the above-entitled suit that the within deposition of Sydney H. Carney may be read in behalf of the defendant upon the hearing of said cause.

BARBER & LACKNAR,
Compl's Sol.
AYRES & KALIS,
Sols. for Defendant.

1. Q. What is your name, age, residence and occupation?

A. Sydney H. Carney; 36; New York, in charge of the agency of the medical department of the New York Ins. Co.

2. Q. Have you heard of the suit of the complainant, Catherine Klein, against the New York Life Ins. Co. on an insurance policy?

A. I have.

3. Q. Did you, after the alleged death of Klein, and about where, see the complainant, and have a conversation with her concerning the insurance; if so, state what was said, and when, and where the conversation took place, giving all of the particulars as far as you remember the same.

A. I did have conversations with complainant once at her house or saloon, and once at Mr. Runyan's office. When I had these conversations, it was after my attention had been called by the co.
79 to an alleged claim. Once I met Mrs. Klein at a saloon, & once at Mr. Runyan's office; she insisted that she had a claim for the face of the policy. I attempted to show her that she hadn't. At these interviews I admitted no liabilities on the part of the co., but offered her this money to avoid litigation and save time. I told her that I would give her, as I remember, something like $700.00, but on the ground, as I stated to her, that if Klein had lived, and had desired a paid up policy, that one would have been issued for something like that amount. This was all the offer that I made her, and upon leaving I withdrew the offer.

4. Q. What did Mrs. Klein say in either of the said conversations, if anything, concerning her knowledge of the said policy of insurance before the death of her husband, or going to show that she had knowledge thereof prior to her husband's death?

(Compl't' sol'r objects to that part of above question which calls for the conclusions of what the witness said.)

The defendant's counsel desires the witness not to answer what his conclusions were, but to give the language of Mrs. Klein on the subject.

A. Mrs. Klein spoke of having known that this policy was in existence before the death of Mr. Klein, and mentioned speaking to him at one time about paying the premium, and he told her to "go away and not bother him." As near as I remember those were the exact words.

5. Q. When and where did the conversation referred to in the
80 last interrogatory between you and Mrs. Klein occur?

A. I wouldn't swear positively—either at her place, or at Mr. Runyan's office; I do not know at what time this occurred.

6. Q. You have previously stated there were two conversations between you and Mrs. Klein; one at her saloon, or house, and the other at the office of Mr. Runyan & his associates; was it at one of these conversations at which Mrs. Klein referred to the policy of insurance as stated in your answer to the fourth interrogatory?

A. It was at one of those interviews, if not both.

7. Q. Do you know of any other matter which may be of advantage to either side upon the issues in this cause? State according to the best of your knowledge, information, and belief.

A. I don't know of anything, except what I have stated.

81 Cross-examination by Mr. BARBER:

X 1. Q. How many times have you seen Mrs. Klein?

A. Five or six times.

2. Q. How many interviews have you had with her?

A. Two that I remember.

3. Q. Which occurred first, the interview at her house, or the one at Runyan's office?

A. The one at her house.

4. Q. How came you to go to her house?

A. I was investigating the Klein case, and thought it important to go to Mrs. Klein.

5. Q. Was that the first time you had seen her?

A. I think it was.

6. Q. Who was with you?

A. Mr. Curren once, I think; at the house, I think.

7. Q. Who was present beside yourself and Mr. Curren and Mrs. Klein at the interview at the house?

A. I don't remember any one else.

8. Q. How long did that interview last?

A. But a short time.

9. Q. How did you come to go to Runyan's office?

A. I think she told me her case was in the hands of that firm; so I went there.

10. Q. Who was present at the interview at Runyan's office when Mrs. Klein was present?

A. Mr. Runyan; Mrs. Klein part of the time, and Mr. Curren part of the time.

11. Q. Do you say that Mrs. Klein said at Runyan's office that she knew her husband had this policy in the New York Life before he died, and spoke to him about the payment of the premium?

A. I say so.

82 12. Q. Will you give the language which she used?

A. The exact words of a portion of her remarks I when she spoke to Klein about this policy, he said, "Go away; don't bother me."

13. Q. Then you can only give the language which she said Klein used on that occasion?

A. I can only give the language that she said Klein used.

14. Q. Now, Dr., didn't she say that she had undertaken to talk with Klein about his papers generally, and he said, "go away?"

A. She referred to the particular policy; for that was what I was talking about.

15. Q. Then she said to you that she took this policy to him, did she?

A. No, she didn't; she said she spoke to him about this policy.

16. Q. How did she come to say that, Dr.?

A. In answer to certain interrogatories by me.

17. Q. What were those interrogatories?

A. Cannot give the exact words. I was trying to find out all I could about that case; to see whether it was known by her that a policy was in existence previous to his death.

18. Q. Why did you want to know that?

A. So that I might report all the points of interest to the home office.

19. Q. Did not Mrs. Klein give you to understand at both of those interviews that she didn't know what co. Klein was insured in previous to his death, and that she was unable to communicate in regard to his business matters, or get any information in reference thereto from him for several weeks prior to his death?

83 A. In answer to the first part of that question, she did not give me to understand that she was ignorant of the company he was insured in; but spoke of the fact that he was insured in the New York Life Ins. Co. In answer to the second part of the question, she simply spoke of stupidity during the last few days of his illness; but prior to that time she made no reference of inability to talk with him on business matters.

20. Q. Did she not give you to understand at these interviews that if she had known of his insurance she had the money and would have paid the premium?

A. She did not.

21. Q. In what language did you have your conversations with Mrs. Klein?

A. In the English language.

22. Q. Do you speak or understand the German?
A. I don't speak German; can understand German very little.
23. Q. You had no conversation with her in German?
A. I did not.

S. H. CARNEY.

Subscribed and sworn to before me this 30th day of April, A. D, 1873.
W. A. RUFF,
Notary Public.

84 In the circuit court of the United States for the northern district of Illinois. In chancery.

CAROLINE KLEIN, COMPLAINANT,
vs.
THE NEW YORK LIFE INSURANCE COMPANY, defendant.

Testimony taken before Henry W. Bishop, master in chancery of said court.

SATURDAY, *April 25th*, 1874,

Present, Hiram Barber, jr., of counsel for complainant; B. F. Ayer, of counsel for defendant, and the witness below named.

ORVILLE P. CURRAN, a witness on behalf of the defendant, being first duly sworn, was examined in chief by Mr. Ayer, and deposes and says as follows:

85 Int. 1. Please state your name, age, residence, and occupation.
Ans. Orville P. Curran; 32; Chicago; general agent New York Life Insurance Company at Chicago.
Int. 2. How long have you been the agent of the New York Life Insurance Company at Chicago?
Ans. Nearly ten years.
Q. Did you know Frederick W. Klein in his lifetime? If so, state when and how long you knew him.
Ans. I did not know him personally.
Int 4. Do you know whether or not he had a policy of insurance in the New York Life, and how you know the fact?
Ans. He had; I knew it from the record I keep, and also from signing the several renewal receipts when he paid his premium.
Int. 5. Where was he accustomed to pay the annual premiums?
Ans. At our office, in Chicago.
Int. 6. Do you know whether or not the semi-annual premium which fell due last previous to his decease was paid?
Ans. I know it was not.
86 Int. 7. Will you state whether you were acquainted with Mrs. Caroline Klein, widow of the said Frederick W. Klein; if so, how long have you known her?
Ans. I am acquainted with her, became acquainted immediately after his death, had several interviews with her.
Int. 8. Where and when did you first see her, and what took place at that interview?
Ans. At my office a few days after his death; she called in reference to this policy, and had the policy with her. She told me at that interview that she did not pay the premium because she took the policy to

her husband and asked him if there was anything to pay on it; he said "go away, don't bother me," and she didn't pay any more attention to it.

Int. 9. Please state how the conversation arose, and who was present, and when it was she represented that this conversation took place with her husband?

Ans. She called, and with her a lady who she introduced as her sister, and we sat down by a desk in the outer office; the clerks in the office were within a few feet. After the statement why she did not pay the premium she showed me her policy which she had with her, and I
87 opened it, showed her that she was the party to pay the premium, and also the agreement or condition of the policy; that a failure to pay premiums by her or any other party for her forfeited the policy and all payments made thereon, and read her the clause and told her that I was very sorry that they allowed it to lapse, as I would be pleased to be able to pay the policy, but that it was not a claim, and all I could do would be to set the facts before the company and she would have to abide by their decision. When I explained the nature of the policy she appeared to feel disappointed. She represented their conversation with her husband to have taken place during February, 1871, the latter portion of the month, just previous to the premium becoming due.

Int. 10. In what language was the conversation carried on?

Ans. In the English language.

Int. 11. Was she able to understand and converse in the English language at that time?

Ans. She was able enough to understand me, and communicate to me so that I could understand her.

Int. 12. Did you have any interpreter?

Ans. No.

88 Int. 13. When and where did you next see Mrs. Klein, and what conversation took place on that occasion, and who were present?

Ans. At my office a few days after the previous conversation, she called again with a gentleman to learn what the decision of the company was; I communicated to her the fact that they had declared the policy forfeited for non-payment of premium when due, and had ordered the receipt returned to them, which I had done. This gentleman, I do not know his name, Mrs. Klein and myself, were present in my private office.

Int. 14. In what language was this conversation carried on?

Ans. English.

Int. 15. Did she appear to understand what you said to her?

Ans. She did.

Int. 16. When and where did you next see her, and what occurred?

Ans. I next saw her at her saloon on west Madison street, with Dr. S. H. Carney, who was our adjuster of losses, and also had charge of the medical examiners of the company. We called to see whether the matter could not be settled, the Dr. represented. We found her
89 there; she was upstairs where they lived, and the party in charge of the saloon called her down, and we sat down at one of the tables in the saloon and talked the matter over. The Dr. asked her why she did not pay the premium when due, or why she did not call at the office and see whether it was all right, after her interview with her husband, when she consulted with him asking him if there was anything to pay, and he told her to go away; the Dr. asked this question after she stated having done so. She didn't know why she didn't. The Dr. had

seen her before on the same day with her attorney, and she was taking under advisement in consultation with her attorneys whether she would accept of a surrender value or not, which the Dr. held out as an inducement, that he thought would be allowed her, and she was to give an answer that afternoon, and we called to learn the answer. She did not appear to be willing to consider the proposal, and then the Dr. went over the case, which brought out the conversation above referred to.

Int. 17. Who participated in this conversation besides the Dr., yourself, and Mrs. Klein?

Ans. No one.

90 Int. 18. In what language was it carried on?

Ans. English.

Int. 19. How long did it last?

Ans. Probably half an hour or thereabouts.

Int. 20. When was it that this conversation last referred to occurred?

Ans. Some time in the summer of 1871.

Int. 21. Did you ever have any other interview with Mrs. Klein, if so, when and where was it?

Ans. I had. I was present the same day that we called at her saloon earlier in the afternoon, about half past twelve I should judge, at the office of Runyan, Avery, Loomis & Comstock. She was in consultation with Mr. Avery in his private office. The door was open. The Dr. and me, Dr. Carney, sat down in the main office and waited for her consultations to cease, and at that time the Dr. was told by Mr. Runyan that she would consult a little further with some of her friends, and give him a definite answer probably that afternoon.

Int. 22. Did you have or hear any conversation at that time with Mrs. Klein?

Ans. Not personally with her, only through her counsel. Dr. Carney had some conversation with her and her attorney, but I remained in the outer office.

91 Int. 23. Do you know anything further than what you have stated in relation to the capacity of Mrs. Klein to speak and understand the English language?

Ans. I do not.

Int. 24. Did you ever have any further conversation with Mrs. Klein than those already narrated?

Ans. I did. I called to see her at her house during the summer of '71 while the Dr. was in Chicago, and these negotiations were pending, on my own account, and tried to get her to accept of the surrender value offered by him, telling her that I felt confident that it was more than she would get if she continued her case; that the company had no liability in the matter, and that she would spend a great deal of money and get nothing for it, and that whatever she could get would be clear profit. I told her that I called on my own account, and as I thought in her interest. I would state that I was desirous of having this matter settled without law, as I thought my own personal interest as an agent would be better served by it, and I was confident that the company would do no better than the inducement previously proposed.

92 Int. 25. Please explain what you mean by the expression, "surrender value" of the policy.

Ans. The company, had Mr. Klein applied previous to his premium falling due, would have granted a paid-up policy for a value to be determined by the actuary. This sum we call a surrender value, and

depends upon the amount of premiums paid and the time the policy has to run.

Int. 26. What did Mrs. Klein say herself in this last conversation?

Ans. She said she would have $5,000 or nothing. That she would not allow the company to value the policy or accept of any sum less that the face.

Int. 27. In what language was this conversation?

Ans. English.

Int. 28. How long was the conversation?

Ans. I should judge about half an hour.

Int. 29. Who took part in it, if any one, besides yourself and Mrs. Klein?

Ans. There was a couple of ladies in the room. We all talked together.

Int. 30. Did you have any interpreter to enable you to understand what Mrs. Klein said, or to enable her to understand what you said?

93 Ans. No; none was needed. At the very first conversation I had with her I asked her if she understood what I said, and she informed me she did.

Int. 31. Why did you ask her that question?

Ans. Because she was a German and spoke broken English, and I wanted to be sure that she understood me, and make it plainer, if possible, if she did not. This is my custom with all what speak the language imperfectly.

Int. 32. Do you speak German yourself?

Ans. Not a word.

Int. 33. Did Mrs. Klein at either of these interviews intimate to you that she had no knowledge of the existence of this policy until after default had been made in the payment of the premiums, or make any excuse for the non-payment of the premiums other than what you have stated? If so, state all that she said upon that subject.

Ans. No, she did not; but on the contrary, stated that she took the policy to him and asked if there was anything to pay on it; and he answered, "Go away, don't bother me," and she laid the policy away. In answer to my question why she didn't pay it she didn't appear to know that she should have paid it herself, but she knew it was not paid.

94 Cross-examination by Mr. BARBER:

X Int. 1. How many interviews did you have with Mrs. Klein after the death of her husband and prior to the commencement of this suit, which occurred about the first of August, 1871, in regard to her claim under this policy?

Ans. I don't remember of having only the two interviews above stated personally with her. I was thinking what Loomis commenced this suit—I know better now. I don't remember of having only the interviews above named. I only remember five times.

X Int. 2. Which was the first?

Ans. In my office shortly after his death.

X Int. 3. Did you have more than one interview with her in your office?

Ans. Yes, sir.

X Int. 4. How many in your office?

Ans. Two.

X Int. 5. Which was the second interview you had with her?

Ans. When she called to learn the decision of the company.

X Int. 6. How long was that after the first?

Ans. Only a few days.

95 X Int. 7. Which was the third interview?

Ans. When I was in her counsel's office.

X Int. 8. Which was the fourth?

Ans. When I was in her saloon with Dr. Carney.

X Int. 9. Which was the fifth?

Ans. When I called upon her at her home in my own behalf.

X Int. 10. How long was that after the fourth interview?

Ans. I think it was the next day, or within a day or two, while Dr. Carney was yet in Chicago.

X Int. 11. How many interviews did Dr. Carney have with her?

Ans. He had several, two of which I was present at.

X Int. 12. You don't know of your own knowledge, then, of any others?

Ans. No.

X Int. 13. In all these several interviews, did you converse with Mrs. Klein in the English language?

Ans. I did.

X Int. 14. Did you in any of them converse with her through an interpreter?

Ans. I did not.

X Int. 15. Did Dr. Carney converse with any of them through an interpreter.

Ans. None that I knew of.

96 X Int. 16. Did you ever at any time converse with Mrs. Klein through an interpreter?

Ans. I did not.

X Int. 17. How well or fluently did Mrs. Klein use the English language on these occasions?

Ans. Broken English.

X Int. 18. What do you mean by broken English?

Ans. She spoke the English very imperfectly, but good enough for me to get her ideas.

X Int. 19. When and where did you first see this policy after the death of Klein?

Ans. In my office at my first interview with her, ℀ 156 Washington st.

X Int. 20. Who brought it there?

A. Mrs. Klein.

X Int 21. Who was with her at that time?

Ans. A lady whom she called her sister.

X Int, 22. What did that lady have to do with the interview?

Ans. Simply joining in the conversation.

X Int. 23. What do you say was said at this interview about her taking the policy to her husband?

Ans. She said that she took the policy and asked him if there was anything to pay on it, and he said "Go away; don't bother me."

97 X Int. 24. Now what are the exact words that she used in that connection?

Ans. I have given them as near as I can remember.

X Int. 25. How did she come to say that?

Ans. She was giving some excuses for the non-payment of premium when due and this was one of them.

X Int. 26. What other excuses did she give?

Ans. That she didn't know whether to pay it or not; that he usually always paid his premiums, and that she never attended to it before, and so she consulted with him to know what to do.

X Int. 27. Well, what else; and he told her to go away?

Ans. Yes; he told her to go away and not bother.

X Int. 28. How did Mrs. Klein happen to be giving excuses for the non-payment of premium?

Ans. I was sort of chiding them for allowing the policy to lapse, telling her that we would rather policies would be kept up than forfeited, and that if she had have let me known if she had not been able to pay the premiums I would have been glad to have paid it myself; that she placed herself in jeopardy by not doing so; that she was to blame and mustn't blame the agency or the company, and so in justification of her acts she gave excuses.

98 X Int. 29. You assumed, did you not, that the bare fact that the premium had not been paid on the day stipulated would a forfeiture of the policy?

Ans. Yes; because that is the nature of the contract chosen. I explained still further that if they had have taken another form of policy, paying a higher premium, that a certain proportion would not have been forfeited, the policy stating the fact, but that they chose the lowest rate of premium, which expressly stated that the premiums must be paid punctually on or before the days they became due.

X Int. 30. You assumed, did you not, from the outset, in your interview with Mrs. Klein, that that policy was forfeited?

Ans. I did.

X Int. 31. Now, did you ask Mrs. Klein at this first interview the direct question whether she knew about the existence of that policy prior to the death of her husband?

Ans. I asked her why she didn't pay the premium on it. I did not, because I had no occasion to ask her that.

X Int. 32. Then your effort was to explain to her the apparent severity the forfeiture rather than to ascertain what her responsibility was in of the matter, was it not?

99 Ans. No; I questioned her fully in regard to the matter, and learned that she was in fault, and then explained to her the condition of the policy.

X Int. 33. How did you learn that she was in fault?

Ans. By her answers to my questions.

X Int. 34. By what answer?

Ans. I don't know as I can tell you any particular answer, but her general answers. She didn't appear to be ignorant in regard to the existence of the policy.

X Int. 35. Are you sure she used the word policy in connection with the papers she submitted to her husband, or attempted to talk with her husband about?

Ans. I think she used this term: I took his life insurance papers to him.

X Int. 36. Now, isn't it true, Mr. Curran, that she was attempting to tell you that she had been unable to communicate with her husband in regard to business matters for some time prior to his death, and that on the last attempt to do so she presented him some papers, not saying what, and he repelled her in the manner stated?

Ans. No; she mentioned particularly the insurance paper.

100 X Int. 37. Was not this interview carried on through her sister as an interpreter?

Ans. No; her sister joined in the conversation, but not as an interpreter. They talked together in German.

The further cross-examination of this witness is continued to Monday, April 27th, 1874, at 10 o'clock a. m.

MONDAY, *April 27th*, 1874—10 o'clock a. m.

Pursuant to adjournment. Present as before.

Cross-examination of O. P. CURRAN continued by Mr. BARBER:

X Int. 38. Who paid the premiums on this policy which were paid prior to the death of Mr. Klein?

Ans. I could not swear positively. I only know from parties stating. I always understood that he paid them himself, but don't know positively.

X Int. 39. Did you ever make any demand on Mrs. Klein for the payment of this premium?

Ans No.

X Int. 40. Did you ever notify her in any way that the premium was due?

Ans. I cannot say that we did or did not, as that was always the work of the clerks. We usually send notices to all of them. The com-
101 pany assumes no responsibility—simply sends them as a matter of courtesy. The premiums are due in New York on the days they are due.

X Int. 41. You say Mrs. Klein's sister was with her on the first occasion?

Ans. A lady which she introduced as her sister.

X Int 42. Which Mrs. Klein introduced as her sister?

Ans. Yes, sir.

X Int. 43. What did that lady have to do at that interview?

Ans. She joined in conversation with both.

X Int. 44. How did she join in the conversation?

Ans. As one friend does with the other.

X Int. 45. But not as an interpreter?

Ans. Not as an interpreter.

X Int. 46. Did you see that lady with Mrs. Klein on any other occasion?

Ans. I don't know as I have.

X Int. 47. Did you see her at your office with regard to this matter at any subsequent time?

Ans. I did not.

X Int. 48. Would you recognize that lady if you should see her now?

Ans. I cannot say that I could. I don't remember of ever see-
102 ing her except at that one interview.

X Int. 49. Do you see these two ladies present?

Ans. I do.

X Int. 50. Are you able to say which one is Mrs. Klein?

Ans. I am.

X Int. 51. Do you recognize the other lady?

Ans. I do not.

X Int. 52. Are you able to state whether the lady with Mrs. Klein here this morning is the one she introduced as her sister at that time?

Ans. I am not.

X Int. 53. Now, you say that on one occasion you went on your own account to see Mrs. Klein?

Ans. Yes, sir.

X Int. 54. You then spoke of having the policy valued, or having a surrender value affixed to it. In your examination you put in the mouth of Mrs. Klein this language, saying "she refused, or would not have the policy valued or a surrender value fixed to it." Do you mean to say that Mrs. Klein used any such language?

Ans. No. Did I use that language in that the other day?

X Int. 55. These are the words, "She said she would have five thousand dollars or nothing; that she would not allow the company
103 to value the policy, or accept any sum less than the face;" did she use that language?

Ans. She would not accept any sum less than the face; she would have five thousand dollars or nothing—the language that she used was, "she would not allow the company to make any offer"—would not encourage any proposition from them.

X Int. 56. Did you say you went to the saloon with Dr. Carney?

Ans. I did.

X Int. 57. Did you find Mrs. Klein there?

Ans. We did.

X Int. 58. How many times did you and Dr. Carney see her at the the saloon?

Ans. Once.

X Int. 59. Were you there on the occasion mentioned by Mr. Loomis?

Ans. I was not.

I desire to explain my answer to cross-interrogatory 1st: My impression was at first that Mr. Loomis commenced this suit, and that I had only two interviews with Mrs. Klein before the bill was filed, but I was mistaken; the bill was not filed by Loomis, nor until after all the interviews took place to which I have testified.

ORVILLE P. CURRAN.

Subscribed and sworn to before me this 1st day of May, 1874.

H. W. BISHOP.

104 In the circuit court of the United States for the northern district of Illinois. In chancery.

CAROLINE KLEIN, COMPLAINANT,
vs.
THE NEW YORK LIFE INSURANCE COMPANY, defendant.

Testimony taken before Henry W. Bishop, master in chancery of said court.

SATURDAY, *April 25th*, 1874.

Present, Hiram Barber, jr., of counsel for complainant; B. F. Ayer, of counsel for defendant, and the witness below named.

GEORGE N. GRUT, a witness on behalf of the defendant, being first duly sworn, was examined in chief by Mr. Ayer, and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.

Ans. George N. Grut; age, 25; residence, Hyde Park; occupation, bookkeeper.

2. Q. Were you ever employed in the office of the New York Life Insurance Company, at Chicago; if so, when, and for how long?

A. I was, about two and a half years; the engagement ended August 1st, 1872.

105 3. Q. Do you know Mrs. Caroline Klein?

A. I do not; not personally.

4. Q. Well, have you ever seen her?

A. I have.

5. Q. Do you recognize the lady present as being Mrs. Klein?

A. I do.

6. Q. State whether you ever saw her at the office of the New York Life Insurance Company; if so, when and under what circumstances.

A. I saw her there twice, once accompanied by a lady and once by a gentleman.

7. Q. Did you hear any conversation that occured between Mrs. Klein and either of the gentlemen connected with your office, upon either of those occasions; if so, what?

A. Well, on the first occasion I heard the conversation with Mr. Curran; I cannot remember the words of the conversation; I would say it was in regard to the policy on the life of F. W. Klein.

8. Q. When was it?

A. It was about the middle of March, 1871.

9. Q. Can you remember the substance of the conversation, or any portion of it?

A. I cannot.

106 10. Q. Do you know in what language the conversation was carried on in?

A. In the English language.

11. Q. Will you state whether you heard Mrs. Klein upon that occasion say anything and whether you could or could not understand her?

A. Well, I could understand her.

12. Q. How long conversation did she have with Mr. Curran?

A. About half an hour.

13. Q. Was an interpreter used?

A. No.

14. Q. At the second visit she made to the office, did you hear the conversation?

A. I did not.

15. Q. How long a conversation took place at that time?

A. I cannot say.

16. Q. Who had the conversation with her at that time?

A. Mr. Curran and Mr. Kearney.

17. Q. You didn't hear it?

A. No, sir.

18. Q. Where was the conversation?

A. It was in the private office.

19. Q. Did they have any interpreter present?

A. Not to my knowledge.

20. Q. You didn't know who this gentleman was that accompanied her?

A. I did not.

107 21. Q. Did you know a man by the name of Stoltz that ever called at the office in reference to this case?

A. I did not.

22. Q. Do you know whether anybody ever called at the Chicago office after the death of Mr. Klein pretending to be Mr. Klein himself?

(Objected to.)

A. There was a man called and questioned Mr. Carter, the cashier, in

regard to whether they would receive Mr. Klein's premium, and in the course of the conversation I heard him ask Mr. Carter if he would receive a premium either the next day or shortly after. Mr. Carter put the question to him saying either "This is not Mr. Klein," or "You are not Mr. Klein, I believe." I remember nothing further of the conversation.

GEO. N. GRUT.

Subscribed and sworn to before me this 25th day of April, 1874.

H. W. BISHOP,
Master in Chancery U. S. Cir. Ct., Northern District of Ill.

108 In the circuit court of the United States for the northern district of Illinois. In chancery.

CAROLINE KLEIN, COMPLAINANT,
vs.
THE NEW YORK LIFE INSURANCE COMPANY, defendant.

Testimony taken before Henry W. Bishop, master in chancery of said court.

MONDAY, *April 27th*, 1874.

Present, Hiram Barber jr., of counsel for complainant; B. F. Ayer, esq., of counsel for defendant, and the witness below named.

MASON B. LOOMIS, a witness on behalf of the defendant, being first duly sworn, was examined in chief by Mr. Ayer, and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.

Ans. Mason B. Loomis; age, 37; reside in Chicago; occupation, attorney at law.

2. Q. Do you know Mrs. Caroline Klein, the complainant in this suit?

A. I have seen her, and know her slightly; have had some business with her.

3. Q. How long have you been acquainted with her?

109 A. Well, I first saw and became acquainted with her shortly after her husband's death; I don't remember just when that was.

4. Q. Did you about the time of her husband's death have occasion to converse with her?

A. Yes, sir.

5. Q. How many times?

A. Oh, several times; I don't remember how many.

6. Q. In what language did you converse with her?

A. I cannot talk anything but English; that was the language we used.

7. Q. State whether Mrs. Klein was at that time able to converse in English language.

A. Yes, sir.

8. Q. Were you ever obliged to have an interpreter to understand what she said, and for her to understand what you said?

A. I have not; we talked with her, and understood very well what she said, the most she said, and she would understand what we said.

Cross-examination by Mr. BARBER:

1. X Q. She employed your firm in regard to this claim against the New York Life Insurance Company?

A. Yes, sir.

2. X Q. Your interviews with her were in regard to that?

A. Yes, sir.

3. X Q. Who had charge of that case?

110 A. Mr. Runyon and myself; she came to Mr. Runyon first and he referred them to me afterwards.

4. X Q. How did she usually come, alone or with some friend?

A. With some friend.

5. X Q. Who did she bring?

A. I don't remember. There was a man—some friend of the family; I forget his name. Once she had a lady with her.

6. X Q. How much English did Mrs. Kline speak? Give us some idea of it.

A. Oh, she would come and pass the time of day, and speak perhaps about the weather, and then hold a conversation about this matter of her husband's death, and would herself state what occurred before he died, and what she had done, if anything, about the insurance.

7. X Q. How did she speak, brokenly?

A. Yes, sir; somewhat.

8. X Q. Were you present at your office at an interview between her and Dr. Carney?

A. I don't remember whether it was at our office; I remember an interview.

9. X Q. Did you have another interview with her and Dr. Carney?

A. Yes, sir; I think it was over on the west side. I went with him to see Mrs. Kline; I think it was in a saloon.

10. X Q. Did you find her?

A. I think we did.

11. X Q. Did Mrs. Kline state to you that she knew about the

111 existence of that policy prior to the death of her husband?

A. I don't know.

12. X Q. Do you remember any such statement?

A. I do not; because I don't know whether she was asked. It has been some time since we had the case, and it has passed from my mind with the case.

13. X Q. It is about three years since you had to do with the case?

A. About that; it was before the fire, I know.

Subscribed and sworn to before me this 27th day of April, 1874.

Master in Chancery U. S. Cir. Court, Northern District of Illinois.

(Endorsed:) Filed May 2, '74. Wm. H. Bradley, cl'k.

112 Afterwards, to wit, on the 29th day of June, A. D. 1874, said complainant, by her solicitors, filed in said clerk's office her bond in appeal in said entitled cause, which said bond is in the words and figures following, to wit:

Appeal bond.

Circuit court of the United States for the northern district of Illinois.

CAROLINE KLEIN, COMPLAINANT,
vs.
THE NEW YORK LIFE INSURANCE COMPANY.

Know all men by these presents, that we, Caroline Klein and George M. Miller, of the city of Chicago, county of Cook, and State of Illinois, are held and firmly bound unto The New York Life Insurance Company of the city of New York, in the State of New York, in the sum of five hundred dollars, to be paid to The New York Life Insurance Company, to which payment well and truly to be made we bind ourselves, and each of us jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents. Sealed with our seals this twenty-second day of June, A D. 1874.

113 Whereas the above-named Caroline Klein has taken an appeal to the Supreme Court of the United States, to reverse the decree rendered in the above-entitled cause by the circuit court of the United States for the northern district of Illinois, now, therefore, the condition of this obligation is such that if the above-named Caroline Klein shall prosecute her said appeal to effect, and answer all costs if she shall fail to make good her said appeal, then this obligation to be void, otherwise in full force and virtue.

CAROLINE KLEIN. [SEAL.]
GEO. M. MILLER. [SEAL.]

STATE OF ILLINOIS,
Cook County, ss :

George M. Miller, being duly sworn, says that he is a resident of the city of Chicago, and has been for the last twenty years, and that he is the surety whose name is subscribed to the foregoing bond, and that he is worth at the least the sum of twenty-five thousand dollars over and above all his debts and liabilities and exemptions, and owns unencumbered real estate in said city worth at least twenty thousand dollars.

GEO. M. MILLER.

Subscribed and sworn to before me this 23d day of June, A. D. 1874.
[SEAL.] JOSEPH STAAB,
Notary Public.

114 We have no objection to this bond, though we do not know the surety.

AYER AND KALES.

Approved.

THOMAS DRUMMOND.

(Endorsed:) Filed June 29, 1874. Wm. H. Bradley, clerk.

115 NORTHERN DISTRICT OF ILLINOIS, *ss :*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein Caroline Klein is the com-

plainant, and The New York Life Insurance Company is the defendant, as the same appears from the files and records of said court, now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district, this 23rd day of October, A. D. 1877, and of our Independence the one hundred and second year.

[SEAL.] WM. H. BRADLEY,
Clerk.

116 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

To the New York Life Insurance Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1878, pursuant to an appeal prayed and allowed, and a bond filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, in a certain cause wherein Caroline Klein is complainant, and The New York Life Insurance Company is defendant, to show cause, if any there be, why the errors mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Hon. H. W. Blodgett, presiding judge of the cir. court of n. dist. Ill., this twelfth day of October, in the year of our Lord one thousand eight hundred and seventy-eight.

H. W. BLODGETT,
Judge.

117 I hereby admit service of the within citation this twelfth (12th) day of October, A. D. 1878.

FRANCIS H. KALES,
Attorney for said New York Life Insurance Company.

(Indorsed:) Supreme Court of the United States. Caroline Klein vs. N. Y. Life Ins. Co. Citation to October term, A. D. 1878.

(Indorsement on cover:) No. 301. Caroline Klein, appellant, vs. The New York Life Insurance Company. N. Illinois C. C. U. S. Filed 19th October, 1878.

OFFICE SUPREME COURT U.S.
FILED
MAR 7 1901
JAMES H. McKENNEY, Clerk.

In Supreme Court of the United States.

No. 301.

CAROLINE KLEIN, *Appellant*,

vs.

THE NEW YORK LIFE INSURANCE COMPANY.

Appeal from U. S. Circuit Court Northern District of Illinois.

Brief for Appellant.

Statement.

I.

On the first day of September, A. D. 1866, the appellee, the New York Life Insurance Company, issued its policy of insurance in the sum of $5,000 upon the life of Frederic W. Klein, the husband of the appellant, for the term of the natural life of said Frederic W. Klein, payable to the appellant within sixty days after due notice and proof of death.

The said policy was issued in consideration of an annual premium of One Hundred and Seventy-Three Dollars, payable semi-annually by the appellant on the first days of September, and March in each year, with the usual conditions of forfeiture in case of the non-payment of such premium.

The premiums were regularly paid from 1866 to 1871, when default was made in the payment of the semi-annual premium which matured March 1st, A. D. 1871. Frederic W. Klein, the insured, died March 18th, 1871.

Immediately after the death of her husband, the appellant prepared and submitted to the Company due proof of his death, and also offered to pay the semi-annual premium which matured March first, 1871. The Company declined to receive such premium, and insisted upon the absolute forfeiture of the policy by reason of the default in the non-payment thereof, on the first day of March, 1871, in accordance with the terms of the policy.

The bill in this case is filed to secure relief from this forfeiture. As a ground of this relief, it is alleged, among other things, that the policy was secured by Klein for the benefit of his wife without her knowledge, and that she was not advised of, and did not know, the terms or import of the policy until the death of her husband; that the husband, Klein, would have paid the premium maturing March 1st, 1871, but for his accidental sickness; that he was taken sick about the first of February, 1871; that for three weeks prior to March 1st, 1871, and from that time till his death, said Frederic W. Klein was, in consequence of such illness, wholly deranged and out of his head with delirium, and wholly unfit for, and incapable of attending to, any matter of business—and that the default in the non-payment of the premium March 1st, '71, was due to such condition; that the appellant, being ignorant of the character and purport of the policy, also failed to make such payment; that no notice was given appellant by the Company of the character of the policy, or demand made for the payment of the semi-annual premium maturing March first, 1871; and that had appellant been advised of the character, terms, or import of the policy she would have paid the said semi-annual premium at maturity.

The answer of the company, among other things, insists upon the forfeiture of the policy.

Evidence was taken on both sides, and on the final hearing on the 19th day of March, 1874, the appellant's bill was dismissed for want of equity.

Assignment of Error.

I.

The court erred in dismissing the bill for want of equity.

Argument.

I.

From time immemorial it has been the practice of Courts of Equity to grant relief against forfeitures.

"And it may now be stated generally that when an inequitable loss or injury will otherwise fall upon a party from circumstances beyond his own control or from his own acts done in entire good faith and in the performance of a supposed duty without negligence, Courts of Equity will interfere to grant him relief."

1st Story Eq. Jurisp., Sec. 89.

Again, "In short, the general principle now adopted is that whenever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory and therefore as intended only to secure the due performance thereof or the damage really incurred by the non-performance."

2d Story Eq. Jurisp., Sec. 1314;

Ibid., Sec. 1315.

Under this doctrine, Courts of Equity have granted relief from forfeitures in a great variety of cases. It is submitted that this doctrine applies with full force to the case at bar, for the following reasons :

1. Frederic W. Klein, on the first day of March, 1871, at the time the semi-annual premium became payable, was sick unto death. He was incapable of attention to business and had been in that condition for some weeks previous and continued in that condition until his death, on the 18th day of March, 1871. This is abundantly shown by the testimony of the following witnesses:

Caroline W. Klein, Transcript p. 8–14;
Dr. Jos. Otto, " p. 16–17;
Nicholas Strotz, " p. 18– .

2. The appellant was, in fact, ignorant of the existence of the policy of Insurance prior to, and at the time of, the death of her husband.

Mrs. Kline, Transcript, p. 14;
Nicholas Strotz, Transcript, p. 18;
Elizabeth Morgan, Transcript, p. 28, 29.

3. The failure to make the payment March 1, 1871, was not due to any financial inability. Transcript, p. 14–15. While every aspect of the case precludes the idea of unwillingness or indifference.

On the contrary, it is beyond question that such failure was due to the fatal illness of the deceased husband, Frederic W. Klein, and the further fact that the existence of the policy was unknown to the appellant.

II.

It will be said that Klein was guilty of negligence in not giving his wife timely notice of the existence of the policy, and that this is a bar to equitable relief. This would be equivalent to the denial of relief, in all cases where by any possible degree of human foresight, the forfeiture might have been avoided. This, however, is not the doctrine of the Courts of Equity. The extreme of human vigilance is not the inflexible condition of relief.

But the failure of Klein to notify his wife of the existence of the policy, was not her fault, and certainly the loss to her in this case is inequitable (a hardship), falling upon her from circumstances beyond her control. It is true, the contract was with the husband; but it was for the *benefit* of the wife; she is the loser, not her deceased husband. And while Klein was, undoubtedly in legal contemplation, the agent of his wife, yet surely a Court of Equity will consider the object of life insurance. There is a public policy to be considered in this class of cases. It is true a life insurance company may base its calculations of profit upon the carelessness, neglect and indifference of mankind, but certainly it should not thrive upon the calamities—the sore afflictions of its patrons.

A forfeiture of the policy under the state of facts disclosed by the evidence in this case, has all the well known features of a penalty, within the doctrine of Courts of Equity—while the appellant may well invoke the power of the Court, which protects innocent parties from losses falling upon them by misfortune—circumstances beyond their control.

All of which is respectfully submitted.

HIRAM BARBER, Jr.,
Att'y for Appellant.

OFFICE SUPREME COURT U. S.
FILED
OCT 13 1881
JAMES H. McKENNEY, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES,

No. 57.

OCTOBER TERM, A. D 1881.

CAROLINE KLEIN, *Appellant*,

v.

THE NEW YORK LIFE INSURANCE COMPANY.

Appeal from the Circuit Court of the United States, for the Northern District of Illinois.

BRIEF FOR APPELLEE.

FRANCIS H. KALES,
Of Counsel.

CHICAGO:
PRINTED BY THE CHICAGO LEGAL NEWS COMPANY, 47 & 49 DEARBORN ST.
1881.

IN THE SUPREME COURT OF THE UNITED STATES,

No. 57.

OCTOBER TERM, A. D. 1881.

CAROLINE KLEIN, *Appellant*,

v.

THE NEW YORK LIFE INSURANCE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

Brief for Appellee.

The bill filed in this case is for relief from a forfeiture for non-payment of premiums falling due on a life insurance policy. The policy was taken by one Klein on his own life; the loss was made payable to his wife, and he died after having failed to pay the premium falling due next before his death.

The bill alleges, amongst other things, that the policy was obtained by Klein for the benefit of the appellant, without her knowledge; that she was not advised of and did not know the terms or import of the policy until the death of her husband; that her husband would have paid the premium maturing

March 1, 1871 (about seventeen days prior to his death), but for his sickness; and the bill contains further allegations touching the nature of his illness, which began about the 1st of February, and continued to the 18th of March, 1871, when he died.

The answer of the Company, while admitting the time of death and of the maturity and non-payment of premium as alleged, denies the other material allegations of the bill, and insists that the policy contract had become, by its terms, forfeited for the non-payment of the premium in question.

POINTS.

I.

The evidence fails to sustain some of the material allegations of the bill.

1. It does not appear from the evidence that Klein would, but for his alleged sickness, have paid the premium maturing March 1, 1871 ; nor, that default in the non-payment of that premium was due to his illness.

2. The evidence does not sustain the allegation that Klein was wholly disabled from transacting business, prior to the default in paying the premium.

Some of the witnesses for the appellant testify to something like a deranged state (Rec. pp. 16, 17, 28); but only for part of the time before the premium matured.

3. The evidence on the part of the defendant tended to show that the appellant actually knew

of the policy before her husband's death ; and, at one time, that she spoke to him about it, but that he told her to go away and not bother him. (Rec. pp. 31, 33, 34.)

4. The evidence further tended to show that the appellant understood and could converse in the English language (Rec., p. 43); and that, in conversation with others, she admitted knowing of the policy in her husband's life time.

II.

The alleged accident was caused by the negligence of the complainant, or her agent. And, in such cases, equity will afford no relief.

1. Upon the evidence, the husband, in procuring the policy for the benefit of his wife, and in paying the premiums during his life, from 1866 to 1871, must, *quoad hoc*, be treated as her agent. His knowledge of the existence of the policy was, therefore, hers. If he advised her of the existence of the policy, the failure on her part to pay the defaulted premium, must be attributed to her direct negligence. If, on the other hand, her husband failed to inform her of the existence of the policy, her want of information was the fault of her agent.

III.

Where a policy of life insurance, as in this case, contains a clause of forfeiture in case of non-payment of a premium when due, the sickness or even

mental disability, partial or total, of a party, will not operate as a waiver of the forfeiture.

Wheeler v. Conn. Mut. Life Ins. Co. 82 N. Y. 543.
Sheridan v. *Phœnix Co.* 8 H. L. Ca. 745.
Robert v. *N. E. Mut'l L. Ins. Co.* 1 Disney, 355; S. C. 2 Disney, 106.
Simpson v. *Accidental Death Ins. Co.* 2 C. B. (N. S.) 257.
Gamble v. *Accident Assurance Co.* 4 Irish Rep. (Law), 204.
New York Life Ins. Co. v. *Statham*, 93 U. S. 24.
Fry Specific Per. (2d Am. Ed.) p. 415, and notes.
Bliss Life Ins. pp. 273, 274.

1. Where a contract is conditional and *unilateral*, and the conditions are inserted for the benefit of the party bound, as a means of coercing performance from the other party who is not otherwise bound, it is within the analogy of legal reasoning that all accidents, and even the act of God, should be at the risk of the party not otherwise bound, the same as in other forms of contract, unless the conditions are qualified by proper exceptions.

In such cases the performance of the thing stipulated may, as respects the party upon whom performance rests, be a condition subsequent; but, whilst the contract remains executory, the act of performance is, nevertheless, a condition precedent to the liability of the other party.

2. Whether the payment of premiums be regarded as a condition precedent or subsequent, still, the acceptance of the policy is an agreement to perform before an ulterior liability shall attach; and that

agreement is precise and absolute in its terms, and seems to leave no room for the introduction of any implied excuse for non-performance, which will, at the same time, save the liability dependent thereon.

Gamble v. *Accident Assurance Co.* 4 Irish Rep. (Law) 204.

3. This doctrine is further illustrated by cases brought for specific performance.

In equity, time of performance was not always regarded as an essential element; but, it seems now to be settled that express stipulations, rendering time of the essence of the contract, will, in equity, be upheld, whether inserted by way of condition or otherwise. And the same is true in respect of covenants for the renewal of leases, as well as in contracts for the sale of property.

Fry Specific Per. (2d Am. Ed.) p. 415 and notes.

4. The case of *New York Life Ins. Co.* v. *Statham*, *supra*, may be relied on by the counsel for the appellant, as a case holding a different doctrine from that here contended for.

But, that case is clearly distinguishable. The act of paying or receiving the premiums, when due, was, in that case, rendered unlawful by the circumstances of war, which arose subsequent to the time the insurance contract was entered into. But here, the payment and receipt of the premium, when due, would have been lawful. Therefore, the obligation to make payment at that time, or to provide for payment, was, in the present case, in no manner suspended.

The written contracts of common carriers are generally unilateral and conditional, even when

payment of freight is suspended until the termination of the voyage. While the act of God, or of public enemies, unless expressly stipulated, would not operate as an excuse for non-performance, nor even as a rescission; still, it cannot be doubted, where a proclamation, in case of war arising after the making of that contract, should forbid all intercourse, and the voyage was from one belligerent country to the other, and was incomplete, that the contract would not only be arrested but rescinded by operation of law, and the carrier excused from performance.

But, neither the act of God, nor the insanity or other disability of a party, has yet been held to excuse the non-performance of one party, where performance was the ground of liability of the other party, whether his promise was an implied one, arising out of a condition accepted by him, but not signed; or whether it arose out of an express stipulation signed by him and binding him to performance.

It is submitted, in conclusion, that the decree below is in accordance with right and the justice of the case, and that it should be affirmed.

FRANCIS H. KALES,
Of Counsel for the Appellee.

14—93

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~313.~~ 68

FERDINAND METCALF AND C. E. TILTON, APPELLANTS,

vs.

WILLIAM G. WILLIAMS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

FILED OCTOBER 22, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 313.

FERDINAND METCALF AND C. E. TILTON, APPELLANTS,

vs.

WILLIAM G. WILLIAMS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

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1 In the circuit court of the United States for the eastern district of Virginia. In chancery.

WILLIAM G. WILLIAMS
vs.
FERDINAND METCALF ET AL.

Be it remembered that heretofore, to wit, on the 30th day of January, 1878, came the plaintiff by his attorney, and filed in the clerk's office of the said United States circuit court for the eastern district of Virginia, a bill in chancery, against Ferdinand Metcalf et al., and thereupon a subpœna in chancery was sued out against them, which bill and subpœna are in the words and figures as follows, to wit:

2 *Bill.*

To the honorable judges of the circuit court of the United States for the eastern district of Virginia:

William G. Williams, of the county of Orange, of the State of Virginia, and a citizen of the said State of Virginia, brings this his bill against Ferdinand Metcalf and Charles E. Tilton, of New York, both citizens of the State of New York.

And thereupon your orator complains and says that on the 2nd day of June, 1877, the said Ferdinand Metcalf instituted in the clerk's office of your honor's court, on the law side thereof, an action of debt to recover of your complainant the sum of $7,000, and $2.03 costs of protest, with interest thereon from the 5th day of October, 1875, until paid, alleged to be due upon a protested check drawn by E. P. Aistrop, secretary, and Wm. G. Williams, V. pres't; that the said check was drawn payable to A. E. & C. E. Tilton and endorsed to the said Ferdinand Metcalf after its maturity and protest; that the writ issued in the name of Charles E. Tilton, surviving partner of himself and Alfred E. Tilton, for the use and benefit of the said Ferdinand Metcalf; that the said writ was duly served on your complainant, and at July rules a conditional judgment was entered; that at the August rules this judg-
3 ment was confirmed at rules on the 1st Monday in August, 1877, and on the 17th day of October, 1877, a judgment was entered in court; all of which will fully appear by reference to a transcript from the record of said court, duly attested by its clerk, herewith filed as Exhibit A, and prayed to be taken as a part of this bill.

Your complainant charges that said judgment should not have been confirmed in court, because he says that he does not owe the said sum of money or any part thereof, and as soon as said writ was served upon him he made arrangement to have the demand properly litigated; that in the month of September, 1877, he employed as his counsel Jas. G. Field, now of the city of Richmond, to appear and plead to said action; that the said Jas. G. Field, a lawyer authorized to practice in your honor's court, appeared in the clerk's office and inquired of the clerk, Mr. M. F. Pleasants, whether he should then file a plea in his office or wait and plead in open court at the next ensuing term. The said clerk replied that it was usual to file the pleas in open court. When the term of the court came on, to wit, in October, 1877, and before the 15th day thereof, the said Jas. G. Field, as counsel for your complainant, appeared in court and called the attention of his honor, Judge Hughes, then holding the court, to the said suit, and stated that he desired to have entered

the plea of nil debet, and to call the attention of the court to some preliminary questions which would have to be settled before a trial could be had upon the merits. His honor Judge Hughes then stated that at the request of Gen'l Eppa Hunton, member of Congress representing the district of which Orange court is a part, he had ordered all cases against persons living in the Congressional district represented by Gen'l Hunton to be tried in the city of Alexandria, as being much more convenient to lawyers and suitors in such cases; that the counsel for the plaintiff were residents of Alexandria and were not then in court, and probably kept away from the knowledge of the fact that this suit under the rule aforesaid would be tried in the city of Alexandria. Upon this statement from the bench your complainant's counsel said he would not press the matter further, but would wait until the court commenced its term in Alexandria to have said preliminary questions disposed of. But the said counsel supposed that the formal plea of nil debet, being the general issue, had been noted by the clerk, and that the judgment obtained at rules had thereby been set aside. The complainant further says that the protested check upon which the suit was brought was not filed with the declaration at any time before the judgment is alleged to have become final. In the State courts it is not usual to write out the plea of the general issue, but it is simply noted on the record by the clerk.

Your complainant further sheweth that thus the matter stood until the January term of your honor's court at Alexandria, when his counsel, the said Jas. G. Field, attended the court for the purpose of having a trial of the suit, when he was informed that, no plea having been entered on the record during the term of the court in the city of Richmond, the case was no longer on the docket for trial. This took the said counsel and your complainant greatly by surprise, and he moved the court to reinstate the cause upon the docket. His honor Judge Hughes was willing to enter an order for this purpose provided the counsel for the plaintiff would consent, but doubted his right to do so without such consent. The counsel was called upon to consent to such an order but refused.

Your complainant, by the omission of the clerk (entirely unintentional) to note his plea during the October term of the court at Richmond, and from the impression made upon the mind of his counsel by the judge as to the place of trial, has been deprived of the right of trial in the said suit at law, has been greatly surprised at finding a judgment confirmed against him in a suit which he always intended to defend, and upon a demand not one dollar of which he justly owes.

Your complainant further sheweth that it has not been, as he is informed, usual to enter a formal adjournment of the court as was done at the last term in Richmond; and that but for the entering of such order his plea as tendered at Alexandria would have been received and the case reinstated upon the docket.

Your complainant is advised and so charges that the said Charles E. Tilton and Ferdinand Metcalf, have, by reason of the circumstances above detailed, obtained an undue and unconscionable, and inequitable advantage of him which they are not entitled to hold, and which, unless remedied, will result in irreparable injury and damage to your complainant. He is further advised that he is entitled in a court of equity to have all proceedings upon the said judgment enjoined and to compel the plaintiffs in the suit at law to reinstate the said cause in order that a trial by jury may be had and justice done in the premises.

To the end, therefore, that justice may be done, and for as much as

your complainant is without adequate remedy save in a court of equity, he prays that the said Charles E. Tilton and Ferdinand Metcalf may be made parties defendants to this bill with apt words to charge them, and that they and each of them may be required to answer each allegation hereof on oath, that they and each of them may be restrained and enjoined from enforcing the said judgment obtained against your complainant; that said judgment may be set aside and the said suit be reinstated on the docket of the circuit court for trial on the law side thereof, and that your complainant may have such other and further relief,
7 general and special, as shall seem to your honor' court meet and proper in the premises. Let a subpœna, &c., &c., &c.

WM. G. WILLIAMS,
By Counsel.

JAS. G. FIELD,* *P. Q.*

(Endorsed:) Bill filed Jan'y 30th, 1878.

8 *Exhibit A, with original bill.*

In the circuit court of the United States for the eastern district of Virginia.

RICHMOND, *October* 17, 1877.

CHARLES E. TILTON, SURVIVING PARTNER of himself & Alfred E. Tilton, for the use & benefit of Ferdinand Metcalf,
vs.
WILLIAM G. WILLIAMS. } In debt.

Be it remembered that heretofore, to wit, at the clerk's office of said court, in Alexandria, on the 2nd June, 1877, came the plaintiff by their attorney and filed their precipe for a suit against said defendant, whereupon a summons was issued, which is in the words and figures following, to wit:

Summons.

Circuit court of the United States of America, eastern district of Virginia, *ss:*

The President of the United States of America to the marshal of the eastern district of Virginia, greeting:

We command that you summons William G. Williams, if he shall be found in your district, to be and appear at the clerk's office of our circuit court of the United States for the eastern district of Virginia, at
9 rules, to be holden at the said clerk's office, in the custom-house, in the city of Richmond, in the district aforesaid, on the first Monday of July next, to answer unto Charles E. Tilton, surviving partner of himself & Alfred E. Tilton for the use & benefit of Ferdinand Metcalf, in a plea of debt for seven thousand dollars & costs of protest, $2.03, to his damage as he alleges of three thousand dollars. And have you then and there this writ.

Witness the Hon. M. R. Waite, Chief Justice of the Supreme Court of the United States of America, at Richmond, this 2d day of June, in

the year of our Lord one thousand eight hundred and seventy-seven, and of our Independence the 101 year.

M. F. PLEASANTS, *Clerk.*

Return.

Executed this tenth day of June, 1877, by delivering to William G. Williams, the within named defendant, in person a true copy of this writ.

C. P. RAMSDALE,
U. S. Marshal,
By J. C. ONEAL,
Deputy Marshal.

10 And at another day, to wit, at rules, held in the clerk's office of said court, at Richmond, on the first Monday of July, 1877. came the plaintiff and filed their declaration, which is in the words and figures following, to wit:

Declaration.

In the circuit court of the United States for the eastern district of Virginia.

CHARLES E. TILTON, SURVIVING PARTNER OF himself & Alfred E. Tilton, for the use & benefit of Ferdinand Metcalf,
vs.
WILLIAM G. WILLIAMS. } In debt.

Charles E. Tilton, a citizen of the State of California, surviving partner of himself and Alfred E. Tilton, now deceased, for the use and benefit of Ferdinand Metcalf, a citizen of the State of New York, complains of the defendant, William G. Williams, a citizen of the State of Virginia, defendant, &c., of a plea of debt, that he render unto the plaintiff the sum of $7,000 lawful money of the United States, with interest thereon, at the rate of six per cent. per annum, from the 5th day of October, 1875, until paid, and also $2.03, notarial charge for the
11 protest hereinafter mentioned, which to him he owes & from him unjustly detains; for that whereas the said William G. Williams, for value received, the 2nd day of October, in the year 1875, at the city of Alexandria, in the State of Virginia, made & signed his certain check in writing, by the name of Wm. G. Williams, V. pres't, bearing date Oct. 2nd, 1875, & then & there delivered the said check to said A. E. & C. E. Tilton, by which said check he directed the First National Bank of Alexandria, Va., to pay to the order of said A. E. & C. E. Tilton, seven thousand dollars, the following being a copy of said check, to wit:

No. .] ALEXANDRIA, VA., *Oct. 2nd*, 1875.

The First National Bank of Alexandria, Va., pay to the order of A. E. & C. E. Tilton seven thousand $\frac{x}{100}$ dollars.

$7,000.00.

WM. G. WILLIAMS,
V. Pres't.

E. P. AISTROSS, *Sec'ry.*

And the said A. E. & C. E. Tilton, to whose order the payment of the sum of money mentioned in the said check was by the said check to be made, after the making thereof & before the same was presented for payment, as hereinafter mentioned, endorsed the said check, their own proper hand being thereon subscribed in the words following, to
12 wit: "Pay cashier First National Bank or order. A. E. & C. E. Tilton, for collection"; & then & there for a valuable consideration assigned and delivered the check so endorsed to said Ferdinand Metcalf, who thereby became the owner thereof, of which endorsement & assignment the said defendant afterwards, to wit, on the 5th day of October, 1875, had notice; and whereas the said check was, at the request of the owner and holder thereof, on the 5th day of October, 1875, presented to & payment demanded of and at the said bank, yet the payment thereof was refused, the cashier thereof, Charles R. Horff, being so endorsed by the defendant, then & there saying "I am instructed not to pay this check," and the said defendant did not & would not then, nor at any time thereafter, pay the said sum of money therein specified, or any part thereof, neither to the said A. E. & C. E. Tilton nor to the said Ferdinand Metcalf, nor to any one else, but has hitherto wholly neglected & so refused to do. Whereupon the said check was duly protested for non-payment; of all which premises the said defendant as well as the said Charles R. Horff & A. E. & C. E. Tilton afterwards, on the said 5th day of October, 1875, had due notice, by rea-
13 son whereof and of the act of assembly in such case made & provided, an action hath accrued to the plaintiff to demand & recover of the defendant, Wm. G. Williams, the said sum of $7,000, with interest thereon, at the rate of six per cent. per annum, from the 5th day of October, 1875, till paid, as also the said sum of two dollars & three cents, the charges of said protest. Nevertheless the said defendant often requested the said sums of money, or either of them, or any part thereof, to the plaintiff, or to the said A. E. & C. E. Tilton, or to said Metcalf, or either of them, has not paid, but the same to pay has hitherto altogether refused & still refuses to pay, to the damage of the plaintiff of $3,000, & therefore he brings suit.

W. WILLOUGHBY,
C. S. BUNDY,
Att'ys for Pl'ff.

Thereupon, the defendant not appearing, on the motion of the plaintiff, by their attorney, it was ordered that judgment be entered in their behalf against said defendant for the debt and interest claimed in the declaration, unless said defendant shall appear and plead to issue at the next rules. At which day, to wit, rules held in said office on the 1st Monday of August, 1877, the defendant not appearing, on the motion of the plaintiffs the last order made in this case is confirmed.

14 And now at this day, to wit, at a circuit court of the United States for the district aforesaid, held in the city of Richmond, in said district, on the 17th day of October, 1877, it was ordered that the judgment obtained in this case at the rules not having been set aside, and the plaintiff being now entitled to a final judgment, it is therefore considered by the court that the plaintiff recover against the defendant the sum of seven thousand dollars, with interest thereon, at the rate of six per cent. per annum, from the 5th day of October, 1875, until paid, as also the sum of two dollars and three cents, costs of protest, and his costs by him about his suit in this behalf expended.

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

I, M. T. Pleasants, clerk of the circuit court of the United States for eastern district of Virginia, do hereby certify that the foregoing is a true and complete transcript of the record and proceedings in the cause therein named.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Richmond, this 18th day of January, 1878.

[SEAL.] M. F. PLEASANTS, *Clerk.*

15, 16 *Chancery subpœna.*

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

The President of the United States of America, to Ferdinand Metcalf and Charles E. Tilton, citizens of the State of New York, greeting:

We command you, and every one of you, that you appear before our judges of our circuit court of the United States of America for the eastern district of Virginia, at the court-room in the custom-house in the city of Richmond, in said district, on the first Monday in the month of March next, to answer the bill of complaint of William G. Williams, a citizen of the State of Virginia, this day filed in the clerk's office of said court, in said city of Richmond, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the eastern dist. of Virginia to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Richmond aforesaid, this 1st day of February, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the 102.

M. F. PLEASANTS, *Clerk.*

MEMORANDUM.—The above-named defendants are notified that unless they enter their appearance in the clerk's office of said court, at Richmond aforesaid, on or before the day to which the above writ is returnable, the complaint will be taken against them as confessed, and a decree entered accordingly.

M. F. PLEASANTS, *Clerk.*

17 (Indorsed:) No. 292. Circuit court of the United States, eastern district of Virginia. Wm. G. Williams vs. Ferdinand Metcalf & Chas. E. Tilton. Chancery subpœna, returnable March r's, A. D. 1878. M. F. Pleasants, clerk. Jas. G. Field, comp't sol.

18 *Injunction writ.*

Circuit court of the United States of America, eastern district of Virginia, *ss:*

The United States of America to Ferdinand Metcalf and Charles E. Tilton, and to your counsellors, attorneys, solicitors, trustees and agents, and to each and every of them, greeting:

Whereas it hath been represented to the judge of our circuit court of the United States for the eastern district of Virginia, on the part of William G. Williams, in a certain bill in our said circuit court, before

the judge of said court, against you, the said Ferdinand Metcalf and Charles E. Tilton, to be relieved touching the matters complained of. In which said bill it is stated, among other things, that your actings and doings in the premises are contrary to equity and good conscience. And it being ordered that a writ of injunction issue out of said court, upon said bill, enjoining and restraining you, and each of you, as prayed for in said bill—

We therefore, in consideration thereof, and of the particular matters in said bill set forth, do strictly command you, the said Ferdinand Metcalf and Charles E. Tilton, your counsellors, attorneys, solicitors, trustees and agents, and every of you, that you do absolutely desist and refrain from enforcing the judgment obtained by you in said court on the 17th
19 day of October, 1877, against the said William G. Williams, until this honorable court shall make other order to the contrary. Hereof fail not, under the penalty of what the law directs.

To the marshal of the district of Virginia to execute and return in due form of law.

Witness the Hon. M. R. Waite, Chief Justice of the Supreme Court of the United States of America, in and for the district of Virginia, at the city of Richmond, this 1st day of February, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the 102d year.

M. F. PLEASANTS, *Clerk.*

(Indorsed:) No. 292. Circuit court of the United States, district of Virginia. Wm. G. Williams vs. Metcalf et al. Injunction writ, returnable March term, A. D. 1878. M. F. Pleasants, clerk. Jas. G. Field, attorney for plaintiff.

20 *Demurrer.*

In the circuit court of the United States for the eastern district of Virginia. In equity.

WILLIAMS
vs.
METCALF, &C.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true in manner and form as the same are therein set forth, do demur thereto, and for causes of demurrer show:

1st. That the said complainant hath not in and by his said bill stated such a case as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from or against these defendants.

2d. That if the matters stated do give the complainant any cause of complaint against this defendant, the same is triable and deter-
21 minable at law, and ought not to be enquired of by this court.

Wherefore, and for divers other errors and imperfections, these defendants demand the judgment of this court whether they shall be compelled to make any further or other answer to the said bill, or any of the matters or things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

W. WILLOUGHBY &
C. S. BUNDY,
Sol'rs for Def'ts.

W. Willoughby and C. S. Bundy, counsel for defendants, do hereby certify that in their opinion the foregoing demurrer is well founded in point of law.

W. WILLOUGHBY,
C. S. BUNDY,
Sol'rs for Def'ts.

22, 23 STATE OF NEW YORK,
City of New York, ss:

F. Metcalf, being first duly sworn, deposes and says that he is one of the defendants in this cause, and that this demurrer is not interposed for delay.

F. METCALF.

Sworn to before me this 12th day of Feb'ry, 1878.
[SEAL.] CHARLES M. STAFFORD,
Notary Public in and for City and County of New York.

(Endorsed:) Filed March 2nd, 1878.

24 U. S. circuit court, eastern district of Virginia, at Alexandria.
In chancery.

WILLIAMS
vs.
METCALF.

Ordered that the complainant have leave to file his amended bill with its exhibits, which is accordingly done, and that a copy of the bill as amended, and of this order, be served upon the defendant's counsel, W. Willoughby, esq., and that the defendant have leave to file his answer to the amended bill at any time before the first day of the next July term of this court, at Alexandria.

RO. W. HUGHES, *Judge.*

ALEXANDRIA, 2*d May*, 1878.

25 *Amendment to bill & exhibits.*

26 (After the word refused on the 7th page of the bill of William G. Williams vs. Ferdinand Metcalf, &c., add the following:)
Your complainant further showeth, that he has, and had at the time of the institution of the suit against him, a full and complete defence to the said suit or demand. The protested check upon which the said suit was brought was not the check of this respondent; but was the check of the "Montepelier Female Humane Association of Orange County, Virginia, an association incorporated by an act of the general assembly of Virginia, approved April 15th, 1874, and having its office in the city of Alexandria, and of which the said Ferdinand Metcalf was general agent in the city of New York; that of this said association your respondent was, at the time of the drawing of the said check, the vice-president, and E. P. Aistrop was secretary; that said association was doing business as a public corporation, and all persons dealing with it dealt with it as such; that the drawing of said check imposed no individual liability on this respondent, for it was signed in his official character, and also by E. P. Aistrop, the secretary of the association, and all persons into whose possession the said check might come could see and were obliged to take notice of the character

of the paper, and of its character the said Ferdinand Metcalf
27 was fully cognizant. He was connected with the said association as one of its general agents in the city of New York, and well knew that the said check was not the individual paper of your complainant. After the drawing of the said check your complainant resigned the office of vice-president of the association, and one W. H. Fowle was elected in his place, and the said Ferdinand Metcalf, on the 1st and 2d day of December, 1875, wrote letters to the said "W. H. Fowle V. president of M. F. H. A.," respecting the said check and some other matters, in which letters the said check was treated by him as the paper of the said association, all of which will more fully appear by the said letters herewith filed as Exhibits 1 and 2, and asked to be taken as part of this bill.

This complainant further says that the said check did not come to the possession of the said Ferdinand Metcalf until after its dishonor, and then with a full knowledge of the character of the paper.

This complainant further says that he could have successfully defended himself in the said suit, because if the said check could, in any aspect, be regarded as individual paper, then it was the joint paper of this complainant and the said E. P. Aistrop, upon which a separate action could not be instituted and maintained against him, and
28 upon the plea of a nil debit, had your complainant been permitted a trial, the paper could not have been given in evidence against him.

Exhibit 1, *referred to in the foregoing.*

[Office of F. Metcalf, broker in commercial paper, 825 Broadway. General Agency of the Montpelier Female Humane Association. P. O. box 4436. W. H. Fowle, esq., V. pres'd't M. F. H. A.]

NEW YORK, *Dec.* 1*st*, 1875.

DEAR SIR: In answer to my telegram of the 23d, you answer, "I send draft to-day; I write also." Not receiving any communication from you up to Sunday, I again dispatched you "Letter as advised in telegram twenty-fourth not received; answer." To this I have as yet no answer; I cannot in any manner account for your silence after receiving your dispatch of the 24th. Will you have the kindness to inform me? I think courtesy would demand this. I have spent my time and money in trying to save the reputation of the ass'n in New York; have
29 had several interviews with the party holding the check of $7,000; also Douchy & Co., as per suggestion of Mr. Barbour. The party holding the check offers to take $2,000 and one-quarter of the capital stock. Douchy & Co. I think I can do something with as soon as they hear from Mr. Beach, their counsel.

Respectfully yours,

F. METCALF,
P. O. box 4436.

P. S.—You will please address me at P. O. box.

Exhibit 2, *referred to in the foregoing.*

[Office of F. Metcalf, broker in commercial paper, 825 Broadway. General Agency of the Montpelier Female Humane Association. P. O. box 4436. W. H. Fowle, esq., V. P. M. F. H. Ass'n, Alexandria, Va.]

NEW YORK, *Dec.* 2*d*, 1875.

DEAR SIR: I am to-day in receipt of your long-lost letter, covering

draft for $250; also, your two subsequent letters. The delay occurred by being misdirected P. O. box 4430, instead of 4436. Excuse my last letter.

Not hearing from my telegram, and receiving no answer to my
30 letters led me to think you had no intention to do so. On receipt of your draft, I immediately went to see the landlord. It struck me I had better call for the lease; doing so, I find the store was taken by E. P. Aistrop, not as secretary of the ass'n; of course I did not pay the rent, the ass'n not being held by the lease. My advice would be not to take any farther attention of this matter. The rent was guaranteed by Alexander, and between you and I, I think would make no loss in this matter, even if he had to pay it, which I have no idea he will do. The landlord of course saw the point, and tried to put me in the gap. I soon placed this in the right light. I had already paid my broker on receipt of your telegram; rather than loose my tenant, I shall try to get this returned if possible. You say in your letter you suppose this is in full for all claims I have against the ass'n; this is not the fact; you will, on the receipt of my account, have the entire thing before you. My excuse for not forwarding same before is, on my last visit to A. I left my books and papers in the safe of a friend in Washington, who has been absent from the city. I expect to be in receipt of them to-morrow, and shall at once forward it. I will soon
31 write you my views in regard to future operations, and hope you will give me some basis on which to work with Douchy & Co.; also the checks. I shall try to be in Alexandria at the next meeting of your trustees if you will inform me when it takes place.

In regard to the check sent, as your ass'n is owing me considerably more, can you not allow it to remain on a/c, it being for monies paid directly out of pocket for your benefit.

Respectfully yours,

F. METCALF.

(Endorsed:) Filed May 2nd, 1878.

32 *Demurrer to amended bill.*

In the circuit court of the United States for the eastern district of Virginia. In equity.

WILLIAMS
vs.
METCALF ET AL.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said amended bill of complaint contained to be true in manner and form as the same are therein set forth, do demur thereto, and for causes of demurrer show:

1st. That said complainant hath not, in and by his said amended bill, stated such a case as doth or ought to entitle him to any such discovery or belief, as is thereby sought and prayed for, from or against these defendants.

2d. That, as shown on the face of the amended bill, the complainant had his day on the law side of this court; that judgment in the matter was rendered thereon fairly and bona fide, and that if any wrong
33 has been done said complainant, it arises from his own fault and neglect, as shown by his said amended bill itself.

3d. That the defence as set up in said amended bill is neither at law

nor in equity a sufficient answer to the demands of the said Metcalf et al., as set forth in their declaration at law.

Wherefore, and for divers other errors and imperfections, these defendants demand the judgment of this court whether they shall be compelled to make any further or other answer to the said amended bill, or any of the matters or things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

W. WILLOUGHBY,
C. S. BUNDY,
Solicitors for Defendants.

We do hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

W. WILLOUGHBY,
C. S. BUNDY,
Solicitors for Defendants.

34 STATE OF NEW YORK,
City of New York, ss:

Ferdinand Metcalf, of said city, being first duly sworn, deposes and says that he is one of the defendants in this cause, and that this demurrer is not interposed for delay.

FERDINAND METCALF.

Sworn and subscribed to befere me this 24th day of May, 1878.
[SEAL.] CHARLES M. STAFFORD,
Notary Public in and for City and County of New York.

(Endorsed:) Filed May 29th, 1878.

35 *Final decree.*

36 In the circuit court of the United States for the eastern district of Virginia. In equity.

WM. G. WILLIAMS, PLAINTIFF,
v.
FERDINAND METCALF, &C., DEF'TS.

This cause coming this day to be heard upon the bill of complaint and exhibits therewith filed, and the demurrer of the defendants to said bill, in which demurrer the plaintiff joined, was argued by counsel. On consideration whereof the court doth adjudge, order, and decree that the said demurrer be and the same is overruled. And it being agreed in open court by counsel for plaintiff and defendants that the court should finally dispose of this case upon the merits, in addition to passing upon the said demurrer, the court, for reasons stated in writing and filed with the papers in the cause, doth further adjudge, order, and decree that the injunction awarded the plaintiff restraining the defendant, Ferdinand Metcalf, from all further proceedings to enforce the judgment obtained at law by him against the said Wm. G. Williams,
37 be, and the same is hereby, made perpetual, but without costs to the said complainant; and this decree is final. And the court doth further adjudge, order, and decree, on motion of counsel for the defendants, that an appeal be allowed from this decree to the Supreme Court of the United States, bond to be given by them, according to law, in the penalty of two hundred dollars, to be approved by the clerk.

RO. W. HUGHES, *Judge.*

ALEXANDRIA, 25*th Sept.*, 1878.

Opinion of the court.

38 WILLIAMS vs. METCALF. } Bill & amended bill in chancery.

On the demurrer of defendant.

The bill charges that the check sued for was not the individual check of the complainant, but was the check of the Montpelier Female Humane Association; that the defendant Metcalf knew it was such; that Metcalf was himself an agent of the said association, and that he treated the check when he received it as the paper of the corporation. I readily admit the general principle of law contended for by defendant's counsel, that commercial paper signed by a person who attaches a descriptio persona to his name, but does not plainly set forth on the paper the principal for whom he acts in signing it as agent, must himself be held to be the principal. But while this is clearly so, yet, if a person really acting as agent, and known by the person who accepts his action to be acting as agent, omits by some inadvertance to set forth the name of his principal in signing as agent, it does not follow that the agent thereby binds himself to that person thus cognizant of his character as agent. These circumstances constitute an exception to the gen-
39 eral principle, and so far from conflicting with the principle, may strengthen and confirm it. I think the bill sets forth enough to show such an exceptional case, and I will therefore sign an order overruling the demurrer.

But the defendant's counsel insist with truth and reason that the check sued upon, and which is set out in its words in the declaration, is the joint obligation of E. P. Aistrop and W. G. Williams. If joint, the suit at law should have been against both these makers; or else, if brought against one of them only, then the declaration, having set out and shown the joint obligation of two, should have aver'ed that the other is dead or is beyond the jurisdiction of the court, or given some other sufficient excuse for the non-joinder of the other obligor. The declaration in this cause does not do so, and is bad on demurrer. (See Gilman vs. Rives, 10 Peters, 298, the conclusive English authorities there cited.)

I understand the case is before me, not only on the defendants' demurrer to the complainant's bill, but in the event that be overruled, then on its merits. If I am not mistaken in this, I will sign an order, not only overruling the defendants' demurrer, but making the in-
40 junction perpetual, and setting aside the order of 6th July, 1878.

RO. W. HUGHES, *Judge.*

NORFOLK, *July 22d*, 1878.

41 *Bond.*

42 Know all men by these presents, that we, William S. Lincoln, Westie Willoughby and Charles S. Bundy, are held and firmly bound unto William G. Williams in the full and just sum of two hundred dollars, to be paid to the said William G. Williams' certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this fifth day of October, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas lately, at a term of the circuit court of the United States for the eastern district of Virginia, in a suit depending in said court between William G. Williams, complainant, and Ferdinand Metcalf and C. E. Tilton, defendants, a final decree was rendered against the said Ferdinand Metcalf and C. E. Tilton, and the said defendants having obtained an appeal, and filed a copy thereof in the clerk's office of the said court, to reverse the decree in the aforesaid suit, at the term at which such decree was rendered & in open court:

Now, the condition of the above obligation is such, that if the said Ferdinand Metcalf and C. E. Tilton shall prosecute said appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

W. S. LINCOLN. [L. S.]
WESTIE WILLOUGHBY. [L. S.]
CHARLES S. BUNDY. [L. S.]

Signed and delivered in presence of—

Approved by—

RO. W. HUGHES, *Judge.*

M. F. PLEASANTS, *Clerk.*

43 (Endorsed:) Filed October 7th, 1878.

44 EASTERN DISTRICT OF VIRGINIA, *ss:*

I, M. F. Pleasants, clerk of the circuit court of the United States for the said eastern district of Virginia, do hereby certify the above and foregoing to be a true, correct, and complete transcript of all the proceedings had in said court in the cause wherein William G. Williams is the complainant, and Ferdinand Metcalf and Charles E. Tilton are defendants, as the same appears from the files and records of said court, now remaining in my custody and control, except certain affidavits, &c., omitted by the direction of counsel for appellants, as not material to the hearing upon appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in said district, this eighth day of October, A. D. 1878.

[SEAL.] M. F. PLEASANTS, *Clerk.*

(Indorsement on cover:) No. 313. Ferdinand Metcalf and C. E. Tilton, appellant, vs. William G. Williams. E. Virginia C. C. U. S. Filed 22 October, 1878.

IN THE SUPREME COURT

OF THE

UNITED STATES

In the Supreme Court of the United States.

No. 313.

———:o:———

FERDINAND METCALF & C. E. TILTON, *Appellants*,

vs.

WILLIAM G. WILLIAMS.

———:o:———

BRIEF FOR PLAINTIFF IN ERROR BY

C. S. BUNDY,
of Counsel.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

STATEMENT OF THE CASE.

The original was a suit at law in U. S. Circuit Court for the Eastern District of Virginia, brought by the payees of a bank check to the use of the holder and owner against the drawer.

Form of action—"debt."

Personal service of summons June 10, 1877.

July rules no appearence; order for judgt. *nisi*.

August rules no appearance; order confirmed.

October term no plea filed; office judg't confirmed.

Execution issued.

Temporary injunction and bill in equity praying a perpetual injunction to the collection of the judgment.

Demurrer to bill for want of equity, and for the reason that complainant has a remedy at law.

Demurrer overruled and decree making injunction perpetual.

From that decree appeal is now before this court.

The substance of the bill appears to be that the defendant's counsel in the suit at law was surprised and misled by the failure of the clerk to note upon the record the plea of the general issue, of which it is alleged, notice was given orally in court during the October term at Richmond, and before the final judgment was confirmed; and the conclusion sought to be drawn therefrom is that in consequence of this omission on the part of the clerk, the defendant, Williams, was deprived of the defense he would otherwise have had to object to the introduction of the check in evidence on the trial, on the ground of variance, that it did not support the declaration, being, as he alleges, the *joint* check of E. P. Aistrop and Wm. G. Williams, whereas Williams was sued alone; and, secondly, that this was not the check of the respondent, Williams, but was the check of the Monpelier Female Humane Association, of Orange County, Va.

To all this we answer:

1. That if it be true that the clerk was in fault in not noticing, or not hearing his oral plea, then plaintiff had a perfect remedy at law in the same court, and therefore, has no standing in a court of equity.

2. That the check sued on is not upon its face the obligation of the Montpelier Association, but is the personal obligation of the signers thereof.

3. That if plaintiff could by any means have availed himself of the defense to the merits claimed in his bill, he certainly could not have done so under the plea of the "general issue," which his counsel claims to have offered.

4. That there is no ground of equitable interference set out in the bill.

ASSIGNMENT OF ERRORS.

The Circuit Court erred in holding:

1st. That sufficient diligence had been shown by complainant to excuse him from a default regularly taken at law.

2d. That a Court of Equity had jurisdiction of this case.

3d. That a suit at law should have been commenced jointly against Williams & Aistrop.

4th. That such an alleged error at law could be corrected by a Court of Equity.

5th. That the check in controversy was the check of The Montpelier Female Humane Association, and not the individual check of Williams.

6th. In overruling the demurrer of the defendant and passing a decree against him perpetually enjoining the judgment at law.

ARGUMENT.

It is a fundamental rule that two things must be shown to concur in a given case before a court of equity will interfere by injunction to restrain a judgment at law.

First. A *substantial defense to the merits* of the action at law, so that it would be *against conscience* to enforce the judgment.

Second. That the defendant was deprived of the opportunity of making his defense at law by fraud or accident, unmixed with any fault or negligence of himself or his agent.

Marine Ins. Co. *vs.* Hodgson, and authorities there cited, 7th Cranch, 332.

It is the purpose of this brief to show, by the authority of leading cases, that the defendant at law, Williams, has no substanial defense to the merits of this action, and *that he was not deprived* of the opportunity of making his defense at law by fraud or accident unmixed with any fault or negligence of himself or his agent.

The following propositions are believed to be well founded in law, and to be supported by an unbroken array of judicial authorities, both in the State and Federal courts.

1st. That the check in suit is the personal obligation of the drawers.

a. That an agent, who is known to be such, and who acts within the scope of his authority, will, nevertheless, be personally responsible when he enters into a written contract upon which the *name of his principal* does not appear.

Story on Bills, § 97;
Story on Agency, § § 147–155;
1st American Leading Cases, 635;
Waring *vs.* Mason, 18 Wend, 425;
Arnold *vs.* Sprague, 34 Vt., 402;
Magee *vs.* Atkinson, 2 Mees. & Wels., 440;

Jones *vs.* Littledale, 6 Adol & Ellis, 486;
Sumwalt *vs.* Ridgely, 20 Md., 107;
Collins *vs.* Buckeye State Ins. Co., 17 Ohio St., 215;
Edwards on Bills, 80;
Chitty on Bills, 27;
Marine Ins. Co. *vs.* Hodgson, 7 Cranch, 337;
Mayhue *vs.* Prince, 11 Mass., 54;
Tucker Manuf. Co. *vs.* Fairbanks, 98 Mass., 101;
Carpenter *vs.* Farnsworth, 106 Mass., 561;
Drake *vs.* Fluellen & Co., 33 Ala., 106;
Fitch *vs.* Lawson, 6 How., (Miss.) 371;
Ford *vs.* Williams, 21 How., 289.

2. That it was not competent for Williams on the trial to introduce parole evidence to prove that the check was not intended to bind himself but the "Montpelier Female Humane Association," for which he claims to have acted.

Higgins *vs.* Senior, 8th Mees. & Wels., 834;
Stackpole *vs.* Arnold, 11 Mass., 27;
Arnold *vs.* Sprague, 34 Vt., 402;
Pents *vs.* Stanton, 10 Wend, 277;
Harkins *vs.* Edwards, 1 Clark, (Iowa) 426;
1 American Leading Cases, 628;
Tytus *vs.* Kyle, 10 Ohio St., 444.

Nash v Towne 5 Wall. 703.

STORY on Bills, § 97, says:

"The rule is well settled as to agents. If they draw or endorse bills in their own names, although on account, and for the benefit of their principals, they must draw, edorse or accept the bills in the name of their principals, and sign for them and in their names."

It is further added in a note:

"That in order to bind the principal and exhonerate himself, the agent should regularly sign thus—A. B. by C. D., his agent, or C. D. for A. B."

Lord DENHAM, in delivering the opinion in Jones *vs.* Littledale, reported in 6 Adol & Ellis, 489, says:

"This is a general proposition, that if the agent con-
" tracts in such form as to make himself personally respon-
" sible, he cannot afterwards, whether his principal were
" or were not known at the time of the contract, relieve
" himself of that responsibility."

Chief Justice MARSHALL, in Insurance Co. *vs.* Hodgson, 7th Cranch, 337, says:

"In the case under consideration the plaintiffs ask the
" aid of this court to relieve them from a judgment on ac-
" count of a defense, which, if good anywhere, was good
" at law, and which they were not prevented by the act of
" the defendants or by any pure and unmixed accident
" from making at law.

"It will not be said that a court of chancery cannot in-
" terpose in any such case. Being capable of imposing its
" own terms on the party to whom it grants relief, their
" may be cases in which its relief ought to be extended to
" a person who might have defended, but has omitted to
" defend, himself at law. Such cases, however, do not fre-
" quently occur.

"The equity of the applicant must be free from doubt.
" The judgment must be one of which it would be against
" conscience for the person who has obtained it to avail
" himself." * * *

COPY OF THE CHECK IN SUIT.

"No.—— ALEXANDRIA, VA., *Oct.* 2, 1875.

"*The First National Bank of Alexandria, Va.*

"Pay to the order of A. E. & C. E. Tilton ————

"Seven thousand dollars.

"WM. G. WILLIAMS, *V-Pres't.*

"E. P. AISTROP, *Sec'y.*

"$7,000."

In Sumwalt *vs.* Ridgely, 20 Md., 107, the note sued on was as follows:

"$742. BALTIMORE, *January* 1*st*, 1857.

"Twelve months after date we promise to pay to the "order of Lot W. Ridgely seven thousand and forty-two "dollars, value received.

"THOMAS W. SUMWALT,

"*Treas. of St. Stephens Ep'el Church Fund.*"

Suit brought against the *maker personally.*

The defendant (below) offered the following prayers:

1st. That the note is not the legal obligation of the defendant and does not support the declaration.

2d. That if the note was given for the debt of the vestry, then the plaintiff cannot recover, because there is no consideration expressed on the face of the note sufficient to gratify the statute of frauds in relation to the assuming to pay the debt of another.

3d. That if the note was given by the defendant as treasurer of the building fund of the church, and not for his private account, then the plaintiff is not entitled to re-

cover if the jury shall believe the defendant was authorized as treasurer to give such note, and that the plaintiff knew it was given for such church debt.

The court rejected these prayers; the defendant excepted, and appealed to the court of appeals, where COCHRAN, J., delivered the opinion of the court, using this language:

"The note, on its face, purports to be an individual obli-
"gation, founded on a consideration expressed as moving
"to the maker, and the terms of the promise are not such
"as show with any sufficient degree of certainty, that it
"was issued for the liability of any other party. Looking
"at the note alone, without regard to the evidence in the
"case, the appellant would undoubtedly be held liable for
"its payment. The established rule seems to be that an
"agent, in making a promise for a principal, is liable on the
"promise, unless it be expressed in terms which show that
"it was made for, and on behalf of, the principal; and
"where an agent makes a promissory note to a third per-
"son in terms sufficient to bind himself as principal, the
"mere addition of the word *agent* or other description of
"his office or capacity to his signature, does not change
"or vary the legal effect of the promise itself."

Story on Prom. Notes, 67, 68, 69.

"The note was properly admitted as evidence of the ap-
"pellant's liability."

In Collins *vs.* Buckeye State Ins. Co., 17 Ohio St., 215, the suit was against Edward K. Collins, personally, upon four several promissory notes of one of which the following is a copy:

"$526.25. NEW YORK, *October* 15, 1857.

"Twelve months after date, I promise to pay to the "order of the Buckeye State Insurance Company, of Cin- "cinnati, five hundred and twenty-six 25-100 dollars at "the bank of the State of New York, value received.

"EDW'D K. COLLINS,

"*Agent.*"

WELCH, J., says:

"The first question made in this case is, whether there "is sufficient proof of the insurance company's knowledge "that Collins was acting as agent.

"That question we need not discuss, unless we think "the fact of such knowledge would make a defense for "Collins against an action on the notes.

"Would it make such defense? In other words, where "an agent makes a promissory note in the form of these, "is he liable as maker of the note, *notwithstanding the fact "that the payee knew he was acting as such agent at the time?*

"We are of the opinion that he is so liable. To hold "otherwise, it seems to us, would be to make a new con- "tract for the parties.

In Stackpole *vs.* Arnold, 11 Mass., 27, the question discussed is whether parole testimony could be admitted on the trial to prove the intention of both parties to the contract to control and alter the tenor and effect of the writing *not under seal*, and it was decided that it could not. The suit was upon a promissory note.

PARKER, J., uses the following language:

"The fundamental principle that deeds and specialties "cannot be explained or varied in their significance by pa-

" role evidence if the terms made use of in the instru-
" ment are capable of sensible explanation of themselves,
" seems never to have been questioned. * *

" But it has sometimes been suggested that the rule does
" not apply to *written simple contracts*, because, it is said,
" there being but two descriptions of contracts, those by
" specialty, and those by parole, and specialties being only
" those contracts which are under seal, all written simple
" contracts are parole contracts; and that, therefore, parole
" evidence may be applied to them. But it is manifest,
" from a recurrence to the authorities, that there are *three*
" instead of *two* only, classes of contracts, viz., *specialties* or
" those by deed; *written contracts not under seal*, and *parole* or
" *verbal* contracts where there is neither seal nor writing;
" and it is equally manifest that the rule excluding oral
" testimony has been applied generally, if not universally,
" to simple contracts in writing, to the extent and with the
" same exceptions as to specialties or contracts under
" seal. * * *

" It is not because a seal is put to the contract that it
" shall not be explained away, varied or rendered ineffec-
" tual, but because the contract itself is plainly and intel-
" ligibly stated in the language of the parties, and is the
" *best possible evidence* of the intent and meaning of those
" who are bound by the contract, and those who are to re-
" ceive the benefit of it."

Mayhew *vs.* Prince, 11th Mass., 54. This was an action of assumpsit upon eight several bills of exchange, drawn by the defendant at New Orleans, on Higginson, Dodge & Co., a mertcantile house in New work, of which Samuel Hig-

ginson, Jr., of Boston, was principal. The bills were payable to the plaintiffs, or their order, and by the tenor of them were to be placed to the credit of the said Samuel Higginson, Jr.

The defense set up was that the defendant was a mere agent of said Samuel Higginson, Jr., for whose use and on whose account the said bills were drawn, and that the plaintiff knew that the defendant acted in that capacity in drawing the bills. It was alleged that this appeared by the tenor of the bills themselves, and by the letter of instructions of the said Samuel Higginson, Jr. It was also proved that the agents of the plaintiff in Boston, to whom the bills were sent on for collection, called on Mr. H. for payment, who paid about one-half of the amount, and that Prince, the drawer, was a young man of little property, beginning business under the patronage of Mr. Higginson, having had committed to him the purchase of the cargoes of two vessels at New Orleans, for which the bills in question were drawn. If these facts would constitute a good defense for the drawer of the bills, the verdict taken for the plaintiff was to be set aside, and the plaintiff, to become non-suit, otherwise judgment was to be rendered upon the verdict. PARKER, J., delivering the opinion of the court, said:

"The defendant drew the bills in question, putting his "own name to them without any qualification. He must, "therefore, be considered the responsible drawer. The "agency under which he acted is a matter betwen him "and his employer, but cannot protect him from the claim "of the payees of the bill who have a right to consider "him as an independent drawer, notwithstanding they "may have known either from the *terms of the bills themselves*,

" or from extraneous evidence, that the defendant was act-
" ing as servant to one of the house on which the bills were
" drawn."

Tucker Manfacturing Company vs. Fairbanks and others, 98 Mass. 101.

Action on *Contract* against David Fairbanks & Co., as drawers of the following bill of exchange.

" $4,469.76. BOSTON, *March* 23, 1866.

" Two months after date, pay to the order of Messrs.
" Hiram Tucker & Co., four thousand four hundred and
" sixty-nine and 76-100 dollars, value received, and charge
" the same to account of

" DAVID FAIRBANKS & CO.,
" *Agents Piscataqua F. and M. Ins. Co.*

" To Piscataqua F. & M. Ins Co.
" So. Berwick, Me."

Across the face of the draft was written "accepted for the Treasurer, David Fairbanks, President," and on the back "payable in Boston, Hiram Tucker & Co."

Trial by jury was waived, and the case heard by Foster, J., who found the following facts.

" The signatures of all the parties to the bill were
" proved or admitted. It was actually made and delivered
" to the officers of the plaintiff corporation and accepted
" by them on the 3d day of April, 1866, in payment and
" satisfaction of the amount of the loss by fire, due on a
" policy of insurance effected by Hiram Tucker & Co., in the

"Piscataqua Fire and Marine Insurance Co. which had "been ascertained on the 23d day of March, and was payable "sixty days afterwards, and had been assigned by Hiram "Tucker & Co., to the plaintiff on the 26th of March.

"The plaintiff had full knowledge of all the circum- "stances under which the bill was made.

"No evidence was offered of any fraud attending the "making of the bill.

"The defendants offered parole evidence tending to show "that it was not expected nor intended that they should be "liable on the bill, and it was given only to settle the loss, "and was supposed and expected by both parties to create a "debt against no one but the Insurance Company."

But the Judge excluded such evidence, and held that the question of defendant's liability must be determined by the instrument itself.

GRAY, J., delivered the opinion of the Court, affirming the personal liability of defendant and after reviewing the leading cases reported in the various States laid down the following principles.

"In order to exempt an agent from liability upon an in- "strument executed by him within the scope of his agency, "he must not *only name his principal* but he must express by "some form of words that the writing is the act of the "principal, though done by the hand of the agent.

"If he does this the principal is bound, but the agent is "not. But a mere description of the general relation or office "which the person signing the paper holds to another per- "son, or to a corporation, without indicating that the par- "ticular signature is made in the execution of the office

"and agency, is not sufficient to charge the principal or "exempt the agent from personal liability."

I cite another Massachusetts case because it is later than those heretofore cited, and for the additional reason that in this case the opinion of the Court, delivered by the same learned Judge (Gray) *exhonerates* the signer of the instrument from personal liability, while at the same time it reiterates the principles already contended for:

The case is Carpenter *vs.* Farnsworth, 106 Mass., 561.

Suit upon a check, of the face of which the following is a copy:

Ætna Mills.

"$19.20. THE BOSTON NATIONAL BANK.

"BOSTON, *September* 9, 1869.

"Pay to L. W. Chandler, or J. E. Carpenter, or "order, nineteen dollars 20-100.

"J. D. FARNSWORTH,

"*Treasurer.*"

The following facts were agreed upon:

The Ætna Mills owed Chamberlin $19.20 for an order accepted by them payable to him or order, and Chamberlin endorsed the order to the plaintiff, who requested the defendant to pay it, whereupon the defendant, who was the Treasurer of the Ætna Mills, and authorized to sign checks for them, gave the plaintiff the check declared on. The Boston National Bank refused payment of the check, and due notice thereof was given to the defendant.

GRAY, J., deliveres the opinion of the Court, and says:

"The question who is liable thereon as drawer *must in all* "*cases be determined from the instrument itself*, citing Tucker, "Manuf. Co. *vs.* Fairbanks, and authorities there cited." * *

"But we are of opinion that this case does not fall with-
"in that class, to which all those cited for the plaintiff be-
"long, in which the name of the principal appears upon the
"instrument by way of *the mere designation of the general*
"*relation which the signer holds to a corporation;* and that *the*
"*check manifests upon its face that the writing* is the act of the
"principal, though done by the hand of an agent, or in
"other words that it is the check of the Ætna Mills executed
"by Farnsworth as their Treasurer, and in their behalf."

And the learned Judge supports that opinion by examples like these:

In Tripp *vs.* Swanzy Paper Co., a draft not naming the principal otherwise than by concluding, "and charge the same to the Swanzy Paper Company. Yours respectfully, Joseph Hooper, Agent," was held to be the draft of the Company.

In Fuller *vs.* Hooper, a draft with the words "Pompton Iron Works," printed in the margin, and concluding, "which place to account of Pompton Iron Works. W. Burt, Agent," was held to bind the proprietor of Pompton Iron Works.

In Slauson *vs.* Loring, a draft having the words: "Office Portage Lake Manufacturing Company, Hancock, Michigan," printed at the top, was signed "J. R. Jackson, Agent."

Another reason for citing this case (Carpenter vs. Farnsworth,) is that it is referred to by counsel on the other side in support of his view of the law, and in my opinion this case more sharply than any former example brings out the

true criterion by which to determine the question of liability, between the principal and agent. In the almost infinite variety of cases, that have come under judicial cognizance, some decided one way and some another, it would appear that one thing is found *indispensable* in order to exhonerate the agent upon any instrument in writing signed by an agent. That *is* that the *principals' name must appear upon the instrument.*

In the case at bar no name except that of William G. Williams, and A. P. Aistrop appears, and the latter name is at the left of the paper, appearing rather as a witness than a party to it.

Drake *vs.* Fluellen & Co., 33 Ala., 106.

Suit by payee against the maker of a note in the following words and figures:

"$805.87. COLUMBUS, GA., *June* 1, 1853.

"One day after date I promise to pay A. C. Fluellen & Co., " or bearer, eight hundred and five, 87-100 dollars for value received.

" J. W. W. DRAKE,
Secretary Auburn Masonic Female College.

The substance of the defendant's plea was that the note was executed and delivered to the plaintiff for a debt due and owing to them by the " Auburn Masonic Female College," that the defendant was the secretary thereof, and under the rules and regulations thereof was duly authorized to execute and deliver said note to plaintiff. That he did so in his capacity as secretary and not in his personal capacity? That the plaintiffs were informed at the time

they received said note that it was intended to be, and was the note of said corporation, and as such they received it.

To this plea there was a demurrer, which was sustained, and judgment for the plaintiff.

STONE, J., delivering the opinion of the Court, says: "The complainant alleges the note was made by defendant. "The note copied in the bill of exceptions imposes, *prima* "*facie* a personal liability on the defendant."

In Fitch *vs.* Lawton, 6 How., (Miss.) 371, the note was as follows:

"POST NOTE. No. 40.

"$100. COMMERCIAL BANK OF RODNEY.

"RODNEY, MISS., 8 *March*, 1839.

"Six months after date we promise to pay to R. W. "Worthington, or order, one hundred dollars at the Bank "of Rodney with five per cent. interest until due.

"THOMAS FREELAND, *Pres't.*

"I. LAWTON, *Cashier.*

Suit against the makers personally. *Per curiam:*

"It is in the form of an ordinary promissory note, and "on its face shows a good cause of action."

In all the examples given the question of the intention of the parties to the contract is ascertained from the terms of the instrument itself, whether it be a note, a bill, or check; and parole evidence to explain or modify such intention was excluded.

These examples comprise leading cases from the highest courts of seven different States, and the list might be greatly extended. So far as I have been able to examine the reported cases there is substantial uniformity of decision throughout the State and Federal courts.

The principles of law relative to the admission of parole evidence as laid down by Justice Parker, in Mayhew *vs.* Prince, 11 Mass., 54, heretofore cited, have been modified in some respects by later decisions, but not in such manner as to change or weaken its authority as bearing upon the question under discussion in this case.

The tendency of more recent decisions has been to establish this result; that while a check or note signed as this was, unquestionably binds the signers personally, yet it may, in a proper case, be shown by parole, that it *also* binds another party—as for instance, an unnamed principal. See Ford *vs.* Williams, 21 How., 289. In this case Justice GRIER delivering the opinion of the court, says:

"The contract of the agent is the contract of the princi-
"pal, and he may sue or be sued thereon, though not
"named therein; and notwithstanding the rule of law that
"an agreement reduced to writing may not be contra-
"dicted or varied by parole, it is well settled that the
"principal may show that the agent who made the con-
"tract in his own name was acting for him. This proof
"does not contradict the writing; it only explains the
"transaction. But the agent who binds himself, will not
"be allowed to contradict the writing by proving that he
"was contracting only as agent, while the same evidence
"will be admitted to charge the principal. Such evidence
"(says Baron Parke) does not deny that the contract binds

"him whom on its face its purports to bind, but shows that "it also binds another by reason that the act of the agent "is the act of the principal."

I venture to think that no merely technical rule of construction will account for the uniformity with which the highest courts have maintained the personal liability of the signer of such ambiguous paper. The reason lies deeper than any merely technical rule, and is founded in the necessity of maintaining good faith in dealing, and fidelity to business obligations. Should any other rule be established how easy and convenient would be the refuge provided for any scamp who wished to practice fraud. He would always sign his obligations behind a mask, disclosing just enough of his personal identity to lure on his victim, and when called upon for payment, as in this case, he would dodge behind the skirts of the "Female Humane Benevolent Association," and save his money to employ ingenious counsel who would explain how he is not *personally liable*.

Recurring to the second prerequisite to the interference of a Court of Equity to set aside a judgment, I inquire: Was the defendant deprived of the opportunity of making his defense at law, by *fraud* or *accident, unmixed with any fault or negligence of himself or his agent?*

The Statutes of Virginia relating to office judgments, which are made by U. S. Statute to govern the practice in the Federal courts held in that State, provides, Sec. 45, Chap. 167, Code of Va.:

"Every judgment entered in the office wherein there is "no order for an inquiry of damages * * * shall,

"if not previously set aside, become a final judgment if "the cause be in a Circuit Court, of the last day of the "next term, or the fifteenth day thereof, (whichever may "happen first) * * * and have the same ef- "fect by way of lien, or otherwise, as a judgment rendered "in the court at such term.

"Sec. 46. If a defendant, against whom judgment is "entered in the office, shall, before it becomes final, appear "and plead to issue, it shall be set aside unless an order for "inquiry of damages has been executed."

The decisions of the Virginia courts upon this statute are numerous and uniform in refusing to re-open a judgment taken in any degree through the fault or negligence of the party or his attorney.

Endors Exr's. *vs.* Burch, 15th Grat., 68;
Richmond *Enquirer* Co. *vs.* Robinson, 24 Grat., 548;
3 Goolsby vs. St. John, 25, Grat., 146;
1 Tapps Admrs. vs. Rankin, 9 Leigh, 478.

As to what constitutes *negligence* of the attorney, see Wallace vs. Richmond, 26 Grat., 67.

The record shows that defendant was served with the summons June 10, 1877. That he did not engage his attorney to make his defense until September, and all that is alleged in the bill to be done was at the October Term in Richmond, Mr. Field, "his attorney appeared in court, "and called the attention of his Honor, Judge Hughes, "then holding the court, to said suit, and stated that he "desired to have entered the plea of *nil debet*, and to call "the attention of the court to some preliminary questions

"which would have to be settled before the trial could be "had upon the merits, and that he supposed that said plea "had been noted by the clerk." (p. 1 and 2 of Record.)

He does not allege that he asked leave to plead, and it was so ordered; or that he, or the Judge presiding directed the clerk to enter a plea; and the whole colloquy in court, as set out in the bill, amounts to nothing more than an inquiry by the counsel as to the place of trial, which was answered by the Judge that it was a case to be tried in the City of Alexandria, when the attorney replied that "he would not press the matter further." (p. 2 of Record.)

Whatever looseness of practice may prevail in the "courts of the States" it is submitted that this is not in any legal sense "pleading to issue." That question is however unimportant, for the defendant is treated throughout this discussion exactly as if he had entered his plea of *nil debet*. And we say that under that plea he had no defense to the action upon its merits.

But the learned Judge in his opinion overruling the demurrer to the amended bill declares that the declaration is bad on demurrer for non-joinder of parties defendant, and cites for authority Gilman vs. Rives, 10 Peters, 298.

In this he is manifestly in error.

STEPHEN on Pleading lays down the rule as follows:

"In actions *ex-contractu*, if ~~two~~ too few persons are made de "fendants, advantage can only be taken of it by *plea in* "*abatement;* hence, if there be any doubt as to the number "of persons liable, the plaintiff should first sue those only "who are certainly liable, running the risk of a plea in "abatement, which must at an early stage of the proceed "ings furnish him a better writ.

First Chitty, 29, lays down the same rule.

In the very case cited by Judge Hughes, STORY, J., says, speaking of non-joinder of parties defendants:

"But such an objection can only be taken advantage of "by a plea in abatement; for if one party only is sued, it is "not matter in bar of the suit, or in arrest of judgment "upon the finding of a jury, or of variance in evidence upon "the trial. Thus, for instance, if one obligor be sued upon "a joint bond, and upon oyer, the bond is spread upon the "record, and thereby becomes a part of the declaration, by "which it appears that another person is named as a joint "obligor, the party sued should not demur, but should "plead in abatement that the other sealed and delivered "the bond, and was in full life; for *non-constat*, upon the "oyer, that the other did seal and deliver the bond."

Judges Hughes was misled by not noticing that the instrument sued on in Gilman *vs.* Rives was a *judgment* record, where, for obvious reasons, a different rule of pleading prevails, and where a non-joinder of parties is ground of demurrer.

But pleas must be pleaded in their order:

First. Dilatory pleas, of which the plea in abatement is one.

Second. Peremptory pleas, or pleas to the merits. And having once pleaded to the merits, a party cannot go back and interpose a dilatory plea.

The plea in this case was *nil debet*, being the general issue to this action, *in debt*.

But why did not the pleader plead in abatement?

The Code of Virginia, p. 1092, § 21, provides:

"No plea in abatement for the non-joinder of any person as a co-defendant shall be allowed in any action, unless it be stated in the plea that such person is a resident of this State; and unless the place of residence of such person be stated with convenient certainty in an affidavit verifying the plea."

And sec. 737, Revised Statutes United States, provides that, "non-joinder of parties who are not inhabitants of, nor found within, the district as aforesaid, shall not constitute matter of abatement or objection to the suit."

Now if Aistrop, the co-signer of the check were not a resident nor an inhabitant of Virginia, but were a resident of the District of Columbia, it would have been impossible for the defendant at law to avail himself of the plea in abatement.

Finally, if in this case there should be thought to be any foundation for the imputation against the clerk that he was negligent in omitting to enter that oral plea of *nil debet*, then the case of Goolsby *vs.* St. John, 25th Grat., 146, shows that the defendant had a "plain, cheap, summary, and complete remedy at law. 95 U.S. 125.

C. S. BUNDY,
of Counsel for Appellant.

FILED
MAR 22 1905
JAMES H. MCKENNEY, CLERK

IN THE SUPREME COURT
OF THE
UNITED STATES

———:)o(:———

FERDINAND METCALF ET AL.,

vs.

WILLIAM G. WILLIAMS.

———:)o(:———

No. 253.

POINTS FOR PLAINTIFF IN ERROR BY

W. WILLOUGHBY,
Counsel.

EDWARD A. HENKLE, LEGAL PRINTER, 408 L.A. AVE.

In the Supreme Court of the United States.

———:o:———

FERDINAND METCALF, *et al.*,
vs.
WILLIAM G. WILLIAMS.
No. 318

———:o:———

POINTS FOR PLAINTIFF IN ERROR BY MR. WILLOUGHBY, COUNSEL.

The authorities and argument thereon by my associate seem to me entirely conclusive; but as different minds arrive at results by different means, and are affected by different presentations of the same subject, I feel justified in presenting my views, in the manner suggested to me.

Injunctions to restrain judgments, regularly procured at law, are granted with reluctance, and only when their enforcement would be, in the language universally used in the authorities and text books, clearly "against conscience;" and when they are cases "unmixed with negligence," on the part of the parties who seek relief. The demands of business and of society require that there should be at least reasonable confidence; that the due and orderly proceedings of courts of law, will not lightly be disturbed.

In the case at bar it is not suggested that in obtaining the judgment there was the least unfairness or artifice or wrong of any kind. The summons was regularly served, personally, on the 10th of June, 1877; the declaration was duly filed, and the cause then proceeded to judgment without further action on the part of the plaintiff or his counsel by the due course and operation of the law, becoming final on the 15th of October, and without any intimation by record or otherwise that any defense was claimed until January, 1878, three months after it became final. By the statute, under the summons in this case, the defendant not appearing at the rules on the first Monday of July, a conditional judgment was entered against him, which was confirmed on the first Monday of August following, and became final at the October term, because the defendant did not "appear and *plead to issue*" as the law provides. (See Ch. 167, Secs. 43 and 46, Code of Virginia, quoted in brief of my associate.) "In using the words 'plead to issue' immediately the intention of the law was to leave a discretionary power with the court to stop all dilatory and frivolous pleas calculated for delay." (1 Rob. Pr., 205.) "In every case in which a plea is offered to set aside an office judgement, the application is addressed to the sound discretion of the court. * * * It should receive none (if objected to) that does not go to the merits of the action." (1 Rob. Pr., 206, citing Wychie *vs.* Macklin, 2 Rand., 426; Gray &. Scott *vs.* Campbell, 3 Munf., 251; Wyatts, Ex., *vs.* Woollief, 1 Leigh, 473.) But the defendant did not plead to issue nor offer nor intend to do so. He did not even employ counsel for about three months and not until after a conditional judgment had become confirmed. His counsel made no record in the case. *He did not even enter any*

appearance during the term of the court; he mentioned the matter to the judge verbally; stated that he "desired" to enter the plea of *nil debet*, but made no offer to do it or request to have it done. What transpired between him and the judge was not a proceeding in court. It was, so far as appears, a private conversation with the judge. It is not stated to have been in the hearing of the clerk and it is manifest that it was not heard by him. According to the statement in the bill it appears that he did not intend even to "*plead to issue.*" He designed, it seems, to make only a preliminary question, which was that Aistrop was not made a party defendant, and which could be taken advantage of only under a plea in abatement. It was upon this suggestion that the judge said what he did, and in reply to which he said that "he would not press the matter further." Of course there was no occasion for speaking of counsel for the plaintiff not being there if he wished to put in the plea of *nil debet*. He then said he "would wait until the court commenced its term in Alexandria *to have said preliminary questions disposed of*." He said not a word to the clerk, though he "supposed that the *formal* plea of *nil debet*, *being the general issue*, had been noted by the clerk." That is, he thought that the clerk would put in this *formal* plea, *because* it was the general issue. In other words it seems that the counsel thought it to be the business of the clerk to put in *formal* pleas like the general issue, whether requested to or not, *even though there were no appearance by the defendant.* The complainant has of course made his statement in the best manner possible for himself, and it is submitted that he has not shown that degree of diligence "unmixed with negligence," which might reasonably be demanded of one duly warned of an impending judgment of seven or eight thousand dollars.

See cased cited in Hilliard on Injunctions, at pp. 202, 209;
8 Leigh, 114; 15 Grat., 68; 26 Grat., 67; 2d Vt., 161.

Suppose, however, that it should be thought that the case is one of proper diligence "unmixed with negligence" on the part of the complainant, he is then bound to show further not simply that a *legal* defense might have been made, but that it is "against conscience" to enforce the judgment, there being no complaint of wrong, or irregularity on the part of the plaintiff. For example, if the defense were based upon something simply prohibited by a statute, such as usury, though, in such case, the legal defense might be perfect, a court of equity would not necessarily disturb the judgment. He who asks equity must do equity, and he must come into court with "clean hands." (5 How., 192; 14 How., 70; 2 Leigh, 410.) Nor could he ask the aid of a court of equity for errors apparent upon the proceedings at law, for the conclusive reason that in such case, he would have an adequate remedy at law, by writ of error. As one ground of *equity*, the complainant says that he could have defended the suit at law upon the ground that, if the check could be regarded as individual paper, it was also the paper of E. P. Aistrop jointly with him, a point which he claims could have made under the plea of *nil debet*. Now, if it appeared to be the joint check of Williams & Aistrop upon the face of the declaration itself, and that Aistrop was liable to be sued, there being a judgment against Williams alone, and a copy of the check being set forth in the declaration, then the remedy at law

for such an error, if it be such, was complete by writ of error and this court has no jurisdiction.

If this does *not* appear upon the face of the declaration, then certainly such fact must be plead in abatement. It should appear, positively, not only that he was a joint maker, but also that he was a resident of the State, that he was living, and that there was no reason why he should not have been joined in the suit.

See Ch. 167, sec. 21, Code of 1873;
See 737 Rev. Stat. U. S.;
1 Saunders 291, 6; 1st Ch. Pl., 29; 5 Burrows, 2613;
1 Peters, 73; 10 Peters, 298.

It certainly does not appear from the declaration that Aistrop was a joint maker of the check with Williams. True, his name appears in the copy, but it is not alleged that he made or signed it. On the contrary, it is expressly averred that it was the check of Williams individually. To take advantage, then, of such a point, he must have plead it in abatement; and in such case, there can be no question that under the statute quoted he must also have alleged that he was a resident of Virginia.

But would such a point be ground for *equitable* interfence? Would it show it to be "against conscience" to enforce this judgment? If so, would it not have been supposed that the complainant would at least have alleged in his bill that Aistrop *was a maker of the check or that he signed it*, and was a resident of Virginia? Ought not the bill at least to show that he was liable to be sued, and that he ought to have been joined in the suit?

But such an objection has no *equity* in it.

In Rice *vs.* Shute, 5 Burrows, 2613, Lord MANSFIELD speaks of such an objection as one "not founded on the *merits* of the cause, but on the form of proceeding."

In 1 Peters, 73, this Court says: "The objection is not fatal to the merits, but is pleadable in abatement only, and, if not so pleaded, it is waived by pleading to the merits. The reason is, that the obligation is still the deed of all the obligors who are such, and, therefore, there is no variance in point of law between the deed declared on and that proved. It is still the joint deed of the parties sued, though others have joined in it."

What substantial difference does it make whether the judgment be against Williams alone, or against him and Aistrop? In either case he would be liable for the whole. If compelled to pay it, he still has a remedy over against Aistrop for what he would justly be liable to pay. But, unfortunately, the bill does not even allege that Aistrop signed the check or would equitably be bound to pay any part of it. On the contrary, it shows that the money to pay the check was at least in the power of Williams, and could not be withdrawn from the bank without his order. It is not to be supposed, and it is not alleged, that the check was given without funds to meet it. The reason for not paying it was simply, as stated by the cashier, that he had been *instructed* not to pay it. Surely there is nothing to show that the enforcement of this judgment would be "against conscience," for the reason that it was against Williams alone, or that he would suffer any hardship for such reason.

It will be observed, that this ground of equity is not an *additional* one to the claim that the check was one of the

Association, but is exactly contrary to it. If it is the check of Aistrop it is also the check of Williams, beyond question. The two grounds of equity claimed to be set forth in the bill are as inconsistent as it is possible to conceive—each being a complete answer to the other.

The defense which the complainant claims he could have made is found set forth upon p. 8 of the record in the amendment to the bill. Aside from the point we have considered, it is, in substance, that the check was not the individual instrument of Williams, but of the Montpelier Female Humane Association, a corporation of which he was Vice-President; and that, from the check itself, and, as shown by letters exhibited with this amendment, Metcalf was aware of this fact.

This statement is most remarkable for its omissions.

It does not state that any of the allegations of the declaration in the suit at law are untrue, except that it is the check of the corporation, instead of the defendant. It does not allege that Aistrop signed or executed the check, that it was his check, that he is a resident of Virginia, or now living, or liable to suit in this court or any other. It is not claimed that the plaintiff was not entitled to recover the money from *some one*. The only question made is whether it should be the alleged Vice-President or the corporation. This Vice-President, who assumes to represent the corporation, says that it *is* the check of the corporation.

It is apparent that the money to pay this claim, not denied to be a joint one, was in the bank, subject to the control of Williams. The reason for not paying it was simply,

as stated by the cashier, that he was instructed not to pay it, not for want of funds. So far as the bill shows, this money is still in the bank. If, then, Williams had authority to give a check for the corporation, as he says he had, and if these funds were the property of the corporation, how is it inequitable, and "against conscience," that the judgment should be enforced? If it is, Williams has the power, according to his own claim, to apply these funds to the payment or immediately reimburse himself or to retain the funds within his power, for such purpose, or at least to make his demand against the corporation for the money he may be compelled to pay.

It is not alleged that the company is insolvent. If it were, and he has in the mean time suffered this money to go from under his control, it would not be "against conscience" that he should suffer the loss rather than an entirely innocent and diligent party. Under the circumstances, having given the check, and knowing it to be justly due, he was at least bound to protect the interest of the payees of the check. If any wrong has been committed he is the one who has enabled it to be done. So far as the corporation was concerned, as he claims he had the power to bind it by giving a check upon its funds, the giving of this check was at least an equitable appropriation of this money to the payment of the claim, and he was bound to consider himself as a trustee, for the purpose of seeing that this appropriation was made.

Story on Prom. Notes, sec. 490, n.

The same party that gave the check instructed the cashier not to pay it, and if the corporation has withdrawn the funds from this bank, it is a wrong to which he is a party.

It would be a "fraudulent misapplication of the appropriated funds"—a wrong to which he would be a party.

Id., 7 Term, 425.

Under the circumstances, then even if this check were given by him in an official, rather than an individual, character, the bill fails to show that it would be inequitable to enforce this judgment. The Statute of Limitations would now prevent the enforcement of this check against the corporation.

But, as conclusively shown by the authorities cited by my associate, this check was not a check of the corporation. Could a suit have been maintained *upon this check* against the corporation? An action in assumpsit might have been brought, and possibly the check given in evidence, to support it, but not upon *the check itself*. A declaration upon a written instrument, must set it out according to its *legal effect*, and how can it be said that the *legal effect* of this instrument shows a promise, or indebtedness, *by the corporation?* I will not add to the argument of my associate upon this point, except by citing the following Virginia authorities:

In Snead vs. Coleman, 7 Grat., 300, the note sued upon was signed "Jesse Snead, Ex'r of John G. Crouch, dec'd." The writ was directed to "Jesse Snead, Executor of John G. Crouch, deceased;" it was endorsed, "no bail required;" and yet judgment was entered by default *de bonis propriis*. The court held this judgment justified by the note.

Observe, that in this case the appellate court took jurisdiction by writ of error, showing that there was no necessity for going into equity.

In Early vs. Wilkinson, 9 Grat., 68, the note was signed "Robert H. Early (for Sam'l H. Early.") Held upon the face of the paper that it was the note of Robert H. Early.

In discussing this case the court, MONCURE, J., says:

"Whether the one or the other be bound, depends upon the intention of the parties; *and that intention must appear from the note itself.* If the name of the principal be not referred to in the note, *the agent who signs it is alone bound.* The difficulty arises only in those cases (which, however, are numerous,) in which *the name of the principal is referred to either in the body of the note or at the foot of it.*"

The court then goes on to show that where the names of *both principal and agent* appear in the instrument then there may be some cases in which a patent ambiguity may be explained by surrounding circumstances, though such cases would be exceptions to the general doctrine relating to patent ambiguities.

If it could be alleged that Williams was the Vice-President of the corporation, and as such he *could* give such a check, it should at least be averred that he had authority to bind the corporation by it. But no such authority is shown by the bill. On the contrary, he had no such authority. According to the charter, Ch. 192, Acts of Va. of 1874, "The property and affairs of said corporation shall be under the control and management of eight trustees." In such a case, as to authority, see Ch. 9 of Angell and Ames on Corporations.

The bill does not show that it was in the ordinary business of this corporation to give checks to such an amount, or that in any case they could be given by the Vice-President and Secretary without any authority from these trustees.

The liabilities created *by this check* could not have been enforced against the corporation, not only because it imports no such liability, but because its maker had no power, *thereby* to create such liability. Certainly the bill does not show how he had such power.

Even if, however, the corporation were liable upon it, still it would not, therefore, follow that Williams wo .d not be liable upon the check.

Ford *vs.* Williams, 21 How., 289;
Nash *vs.* Towne, 5, Wall., 689.

It is said by the court below: "If a person really acting as agent, and known by the person *who accepts his action* to be acting as agent, omits by some inadvertence to set forth the name of his principal in signing it as agent, it does not follow that the agent binds himself to that person, *thus cognizant* of his character as agent."

The authorities show that this is not sound law, but if it were it is not this case.

There is no allegation in the bill that the *payees of the check*, who alone could have accepted "the action, had any such knowledge."

They are not alleged to have any knowledge upon the subject, except as shown by the check itself. They took the check *as drawn*, because they supposed that it was drawn against funds in the control of the drawer, as in fact it was. Metcalf, their assignee, after the check was dishonored, succeeded to their rights, whatever they were.

He had nothing to do with the acceptance or non-acceptance of the check. *His* knowledge, then, would have no bearing upon the construction of this instrument, for it is simply a question of construction or whether parol evidence may be given to change the legal effect of the instrument. As assignee he stands in the place of the payees with all their rights. (96 U. S., 51.)

But it does not appear that he had any actual knowledge more than is disclosed by the check itself. It is alleged in the bill, in connection with and in the same sentence with the claim, that all persons were obliged to take notice of the character of the paper, that he was cognizant of its character, and reference is made to letters to show that he had further knowledge.

But these letters do not refer to this check, except that in that of Dec. 1st, 1875, he says: "Have had several interviews with the party holding the check of $7,000. * * * The party holding the check offers to take $2,000 and one-quarter of the capital stock." (p. 9.)

That is all. The main subject of these letters was some other draft sent on the 23d of Dec. He was not then the holder of this check, and of course could not have treated it as the check of the Association for he had nothing to do with it, and no power over it. It is not alleged in the bill that there was any omission to insert the name of the corporation *through inadvertence*.

The decree shows that it was agreed by both plaintiff and defendant, that the court should dispose of the case as presented upon its merits. The decree of the Circuit Court should be reversed, with directions for a dismissal of the bill with costs.

W. WILLOUGHBY,
For Appellant.



FILED
NOV 3 1881
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

No. 68.

FERDINAND METCALF, APPELLANT,

vs.

WM. G. WILLIAMS, APPELLEE.

BRIEF OF JAMES C. FIELD, FOR APPELLEE.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

No. 68.

FERDINAND METCALF, APPELLANT,

vs.

WM. G. WILLIAMS, APPELLEE.

BRIEF OF JAMES G. FIELD, FOR APPELLEE.

This is an appeal from a decree of the Circuit Court of the United States for the Eastern District of Virginia.

The facts fully appear from the original bill at pages 1 to 3 of the printed record, and the amendment to said bill at pages 8 and 9 of said record. There was a general demurrer to the bill, and an agreement that if the demurrer was overruled the Court should dispose of the case upon its merits. The demurrer admitted all the facts alleged in the bill, but denied that upon those facts the plaintiff in the Court below was entitled to any relief. His Honor, Judge Hughes, presiding in the Circuit Court, overruled the demurrer, and entered a decree perpetuating the injunction granted the plaintiff, Williams, but without costs. From this decree an appeal was allowed. We submit that the decree of the Circuit Court was eminently proper and just, and should be affirmed.

1st. Because the judgment obtained at law in the Circuit Court, in October, 1877, was obtained under such circumstances as to render its execution inequitable and against

conscience, and contrary to the well-established principles of the equity courts. (See Kerr on Injunctions, page 23, Section 16; also Marine Ins. Co. *vs.* Hodgson, 7 Cranch, 336.) In which case Chief Justice Marshall said: "It may be stated as a general principle that any fact which clearly proves it against conscience to execute a judgment, and of which the injured party could not have availed himself at law, or of which he might have availed himself, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will authorize a court of equity to interfere by injunction to restrain the adverse party from availing himself of such judgment." It is submitted that neither Williams nor his counsel was guilty of any negligence in trying to make his defense at law. Indeed his counsel acted with promptness and diligence; appearing in the Circuit Court, both at Richmond and at Alexandria, for the trial of the cause. The rule of the Court, as announced by Judge Hughes, as to the place of trial of causes against citizens of the Eighth Congressional District of Virginia, (the counsel of the plaintiff not then being in court) misled the counsel of Williams; and the omission of the clerk to note the plea of *nil debit*, caused the judgment to be confirmed against Williams, when he was doing all he reasonably could do to present his defense. The Court is also referred to vol. 7, U. S. Digest, first series, page 465, Sec. 323, and the cases there cited; also to Clifton *vs.* Lisor, 24 Ga., 91; Lake *vs.* Cook, 15 Ill., p. 353. In Bibend *vs.* Kreutz, 20 Cal., 109, it was held that "when a judgment has been obtained against a party by surprise, or through mistake of the court, without *laches* on his part, and when manifest injustice must result from it if allowed to stand, he may maintain a suit in equity to have it set aside, after the adjournment of term at which it was entered has deprived him of his remedy by motion." I respectfully submit that these authorities settle beyond controversy, that a judgment obtained under

the circumstances attending the one against Williams, will be enjoined by a court of equity.

2d. Upon the merits I think the plaintiff Metcalf had no regret of action whatever against Williams. They were both agents of the same association. The office and relation of each to the association was well known to the other. Williams made no contract with Metcalf. He simply in conjunction with E. P. Aistrop, secretary of the association drew the check, which subsequently, and after maturity came to the possession of Metcalf, the financial agent in New York of the same association. Metcalf knew where he received the check, that it was the check of the association, and not of Williams. (See his letters on pages 9, and 10 of record.)

It is well settled law that an agent who makes known his principal, at the time the contract is made, is not personally responsible. (See Waite on Action and Defenses, vol. I, page 256, Art. 8, Sec. 1, and the cases there cited.) See Ibid., page 238, where the learned author says: "In regard to commercial contracts and paper, which are frequently drawn up in a loose and inartificial manner, a more liberal rule prevails; and in cases of that nature, if it can collect from the whole instrument that the intention was to bind the principal and not to bind the agent, the courts will adopt that construction of it, however informally such intention may have been expressed. (See the cases cited by the author.) The Court is also referred to the case of Carpenter *vs.* Farnsworth, 106 Mass. Reports, page 561. In this case there was check drawn by I. D. Farnsworth, treasurer, without saying of what company. But the check on its margin had the words "Ætna Mills" printed, and the Court held that this was a sufficient disclosure as to the character of the check, and that Farnsworth was not individually bound. The case at bar is much stronger, the check being drawn by the vice-

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president and the secretary. I also invite the attention of the Court to the opinion of Judge Hughes, at page 12 of the record. Judge Hughes was cognizant of all the facts transpiring in his court and disclosed in the record, and upon the question of the diligence of Williams and his counsel to secure a trial at law, as well as upon the merits, this opinion is entitled to and should have great weight in this Court.

It is respectfully submitted that the Virginia cases cited by counsel for the appellant are not applicable. Williams, from the beginning, has acted with the utmost good faith. He stands upon this record above reproach. He was no more liable, personally, to Metcalf, than Metcalf was to him, both being agents of the same association. The ends of justice require that the decree of the Circuit Court should be affirmed.

JAS. G. FIELD,
Counsel for Appellee.

14-99

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~342~~. 113

WILLIAM DUDLEY, AS ASSIGNEE IN BANKRUPTCY OF WM. P. BUSH, APPELLANT,

vs.

JOSEPH G. EASTON, AMOS J. STILLWELL, SAMUEL LOGAN, WILLIAM P. BUSH, AND EMMA BUSH.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED MARCH 10, 1877.

2

SUPREME COURT OF THE UNITED STATES.

No. 342.

WILLIAM DUDLEY, AS ASSIGNEE IN BANKRUPTCY OF WM. P. BUSH, APPELLANT,

vs.

JOSEPH G. EASTON, AMOS J. STILLWELL, SAMUEL LOGAN, WILLIAM P. BUSH, AND EMMA BUSH.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

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UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the circuit court of the United States in and for said district.

Be it remembered that on the 9th day of September, A. D. 1876, in vacation of the circuit court of the United States for the eastern district of Missouri, there was filed in the office of the clerk thereof a transcript from the district court of the United States for said district, which said transcript is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

WILLIAM DUDLEY, ASSIGNEE OF THE ESTATE of and effects of William P. Bush, bankrupt, in bankruptcy, complainant,
ag'st
JOSEPH G. EASTON, DEFENDANT. } No. 2668.

Be it remembered that at a regular stated term of the district court of the United States in and for the eastern district of Missouri, begun and holden at the city of St. Louis in said district on the first Monday, the 3rd day of May, A. D. 1875, the following proceedings took
2 place in this cause on Monday, the 7th day of June, A. D. 1875, to wit:

Bill filed and subpœna ordered.

WILLIAM DUDLEY, ASSIGNEE OF THE ESTATE and effects of William P. Bush, bankrupt, in bankruptcy, complainant,
ag'st
JOSEPH G. EASTON, DEFENDANT. } No. 2668. In equity.

This day comes the said complainant by Messrs. Dryden and Nathaniel Myers, their solicitors, and file their bill of complaint in this cause against the said defendant.

And on the motion of said solicitors, it is ordered that a subpœna in chancery be issued in said cause against the said defendant, commanding him to enter his appearance and answer the bill of complaint herein on or before Thursday, the first day of July next, 1875.

And the said bill so filed as aforesaid is in the words and figures following, to wit:

Bill in equity.

In the district court of the United States in and for the eastern district of Missouri.

To the honorable Samuel Treat, judge of said district court:

William Dudley, of the county of Marion, in said district, assignee of the estate and effects of William P. Bush, who was heretofore adjudged a bankrupt by your honorable court, as hereinafter set forth,
3 brings this his bill of complaint against Joseph G. Easton, of said county, and thereupon your orator complaining says:

That on or about the tenth day of October, A. D. 1873, the defendant, Easton, instituted a certain suit at law against the said William P. Bush in the circuit court of the State of Missouri, in and for said county of Monroe, in said State, by filing on said day in the clerk's office of said court in the town of Paris, in said county of Monroe, his petition, which he alleged, in substance, that the said Bush and one James G. Longmire, who was also made a defendant in said suit by their certain promissory note therewith filed, and bearing date the second day of December, A. D. 1872, and by them duly made and delivered, had promised to pay to the said James G. Longmire, or order, three months after the date thereof, the sum of three thousand dollars for value received, with interest, after maturity, at the rate of ten per centum per annum, and that afterwards said Longmire had endorsed and delivered said note to him, said Easton, for value, and that the same, though due, remained unpaid, and in which petition he also prayed for judgment against said Bush and said Longmire for the amount of said note and all interest and costs, and by also then and there suing out of said clerk's office a writ
4 of summons returnable to the October, 1873, term of said court and directed to the sheriff of said county of Monroe, by which he, said sheriff, was commanded to summon said Bush to answer said petition, and the said writ coming into the hands of said sheriff was by him on the said 10th day of October, and more than fifteen days before the return day thereof, duly served upon said Bush, and was afterwards by said sheriff duly returned into said court.

And your orator further says that at the time of the service of said summons upon said Bush, he, said Bush, was greatly embarrassed as to his finances, and although then possessed of a large amount of lands and other property of considerable value was yet owing a large amount of debts then past due, which he was not then able to pay, and for the payment of all of which in full his said property did not suffice, and thereupon being greatly oppressed and harassed by the demands of divers other persons, the creditors to whom his said debts were owing, as also by the said suit of said Easton, he, said Bush, did call a meeting
5 of his creditors to be held at a public inn in the city of Palmyra, in said county of Marion, called the National Hotel, on the 24th day of October, A. D. 1873, and thereunto invited and summoned all persons having claims against him, including said Easton, giving them due and reasonable notice of the time and place of said meeting.

And your orator further says that at the said time and place fixed for said meeting as aforesaid, to wit, on said 24th day of October, 1873, at said National Hotel, in Palmyra, said Bush and said Easton, and divers other creditors of said Bush, being, in fact, more than three-fourths both in number and value of all his creditors, met together, and thereupon, he, the said Bush, then and there announced in said meeting to all there present his embarrassed and insolvent condition, and that he had been sued by said Easton as aforesaid, and that he had been also sued by one Amos J. Stillwell, by a suit also brought to said October, 1873, term of said Monroe circuit court, and informed and gave those there present to understand that they, the said Easton and Stillwell, by reason of the bringing of said suits to the said term to the exclusion of his other creditors, were about to get a preference and advantage
6 over all of his other creditors in that thereby they alone would be able to get judgment against him at said term; and also gave all said persons there present to understand that unless some arrangement could be effected and agreed to by which all of his creditors could share alike in his said property, or unless they, said Easton and Still-

well, would withdraw and not further prosecute their said suits to judgment, it was his purpose and intention to place all of his creditors upon an equality, and to that end to give to each and every of them a judgment in their favor and against him for the amount of their first debts respectively, by confession thereof at the said same October, 1873, term of said Monroe circuit court, and also then and there openly requested of them, said Easton and Stillwell, that they should withdraw and dismiss their said respective suits, and also requested of them and of all the other creditors there present that they should extend the time for the payment of their several demands against him, and proposed to them that if they would so extend the time of the payment of their said demands he would convey all of his property to such person as
7 they should select as a trustee to secure to them the payment of their several demands equally, with interest thereon from that time at the rate of ten per centum.

And your orator further says that thereupon the said creditors there present at said meeting, including said Easton and said Stillwell, mutually agreed with each other and with said Bush that they would severally extend the time of the payment by him of their respective demands, and would accept from him in payment or renewal of each of their several demands respectively his four promissory notes, each for the one-fourth part of their said respective demands, and payable respectively in one, two, three, and four years from the time of the making thereof, and bearing interest from date at the rate of ten per centum per annum, and to be secured by a deed of trust mortgage to be made and executed by said William P. Bush and his wife, conveying all of the real estate of him, said William P., unto one Samuel Logan as a trustee, with power to sell said real estate, or any part of it, in case of a default in the payment of said notes, or either of them, and out of the pro-
8 ceeds of such sale to pay all of said notes, and if the same should not suffice to pay all in full, then to apply the same towards the payment of each equally in proportion to the amount of each respectively, and to the end that said arrangement might be made effectual and that said conveyance might be made, they, said Easton and Stillwell, also then and there severally agreed with said Bush and said other creditors, and represented to him and to them, and gave him and them to understand that they would severally withdraw and dismiss their said respective suits pending in said Monroe circuit court as aforesaid, and would not further prosecute the same or take any judgment therein, and thereupon said Bush also then and there agreed with all of his said creditors there present, including said Easton and Stillwell, to make to each of them said four promissory notes for their respective demands as aforesaid, and jointly with his wife to make to said Logan said conveyance of all of his said real estate by deed of trust mortgage, for the purposes and in the manner aforesaid, as soon as it might reasonably be possible to prepare and execute said notes and deed.

And your orator further says that up to the time of the said
9 meeting of creditors at Palmyra, and the making of the promise and representation thereat by said Easton, that he would withdraw and dismiss his said suit and not prosecute the same to judgment, he, the said Bush, had fully purposed and intended, in case said Easton should have prosecuted the same to judgment at said October term, to have also at said term confessed judgments in said Monroe circuit court in favor of all of his creditors, and but for said promise and representation, and for his ignorance of the taking of judgment in said suit as hereinafter stated until said term had ended would so have proceeded

and confessed judgments in said court in favor of all his creditors, and thereby have placed all of them upon an equality in the distribution of his estate.

But your orator further says that after the making of said representation and promise by said Easton at said meeting, he the said Bush relying thereon and supposing that said suit was to be dismissed, gave no further attention to it, and did not, as he otherwise would have done, attend upon the sessions of said court at its said October term either in person or by any attorney, and did not at any time during said
10 term confess any judgment in favor of any of his creditors, but proceeded at once, with as much expedition as the importance of the work to be done and the amount of care and labor necessarily to be bestowed, in order to properly prepare and execute said notes and deed would reasonably admit, to make the said notes and deed and carry out the said arrangement so agreed to as aforesaid.

But your orator further says that before the expiration of a reasonable time for the making of said notes and deed, and on the second day of said term of said court upon which a default could be taken in said suit against said Bush, for want of an answer or other pleading filed herein, namely, on the 31st day of October, 1873, he, said Easton, in violation of his said promise to said Bush and the said other creditors, and in fraud of the rights of him and them, and without any notice to said Bush of the action which he was about to take, did proceed with the prosecution of said suit, and instead of dismissing the same did on said day take a default therein as well against said Bush as against said other defendant Longmire, and did thereupon on said day cause a
11 final judgment to be entered up by said court therein in his favor, and against said Bush and Longmire, for the sum of three thousand two hundred dollars, and thereby did obtain a lien upon all the lands of said Bush lying in the said county of Monroe, of which he then had a great quantity, altogether exceeding in value the amount of said judgment, and thereby also obtained a preference to the extent of the amount of the said judgment over the other creditors of said Bush, and did deprive and cut off said Bush from putting all of his creditors upon an equality by confession of judgment in manner as aforesaid, and from taking and having the advantages and benefits which he might have had upon being adjudged a bankrupt under the provisions of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States, approved March 2nd, 1867, and the acts amendatory thereof."

And your orator further says that after the rendition of the said judgment as aforesaid, and until the end of said October term of said court, no notice was given to said Bush by said Easton or by any one that said judgment had so been rendered against him, nor did he
12 receive any information in respect thereto from any source whatsoever until long after said court had on the third day of November, 1873, adjourned for said term and after said term had on said day fully ended, and it was too late for him to seek to have the said judgment set aside by application to said court on motion according to law and the practice of said court, and so your orator says that in fact no motion was made by said Bush at said term of said court to set aside the said judgment, but that at the close of said term the same became and was from thence conclusive and final beyond any power of said Bush or any one to set aside by any proceeding at law.

Your orator further says that after the close of said term, to wit, on the 28th day of November, 1873, said Easton sued out of the clerk's

office of said court an execution upon said judgment directed to any sheriff in the State of Missouri, and caused the same to be placed in the hands of Daniel McLeod, esquire, sheriff of the said county of Marion,
who thereupon levied upon all the interest of said Bush in divers
13 lands lying in said county of Marion under said execution, and in order to satisfy the same; and also on said 28th day of November, 1873, sued out of said clerk's office another execution upon said judgment, directed unto the sheriff of said county of Monroe, and on the 3rd day of December, 1873, caused the same to be placed in the hands of said sheriff of said Monroe County, who thereupon on said day, under and by virtue thereof, levied upon all the interest of said William B. Bush in divers lands in said county of Monroe.

And your orator further says that, afterwards, on the 28th day of February, 1874, and before any sale of any of said lands under said executions, or either of them, certain of the creditors of said Bush, the aggregate of whose debts exceeded three hundred dollars, filed their petition in this court, praying that, for divers good causes therein set forth, he, the said Bush, might be adjudged a bankrupt within the meaning of the act of Congress aforesaid, and thereafter such proceedings were had in this court upon said petition that, on the 24th day of March, A. D. 1874, he, the said Bush, was duly adjudged a bankrupt as prayed,
and as that, afterwards, your orator, at the first meeting of the
14 creditors of said bankrupt, held before Enos Clarke, esquire, one of the registers of this court in bankruptcy, on the fourteenth day of September, A. D. 1874, was by the votes of the greater part in number and value of the creditors who had proved their debts, duly chosen to be the assignee of the estate and effects of said bankrupt; and as that, afterwards, on the 6th day of October, 1874, the said election of your orator as assignee having been approved by your honor, a deed of assignment was made to your orator by said register, under his hand and the seal of this court, whereby all the estate, real and personal, in which said bankrupt, at the time of the commencement of said proceedings in bankruptcy, was interested, or which he was then entitled to have, was conveyed to and vested in your orator as such assignee, according to the provisions of said act.

And your orator says that he had well hoped that since his said election and qualification as assignee as aforesaid, the said defendant Easton would have made proof of his claim, if any he have, against the estate
of said bankrupt, and would have surrendered up to your
15 orator the said advantage and preference acquired by him as aforesaid, but now so it is, may it please your honor, said Easton has not proved any demand or made any surrender, but still threatens to proceed to enforce said judgment and the levy of said executions, to the manifest prejudice and in fraud of the rights of said bankrupt and the other creditors of his estate.

Wherefore, inasmuch as your orator is without any adequate remedy at law, he now prays that the said judgment and the said executions issued thereon, and the levies made thereunder as aforesaid, may be decreed to be set aside and for naught held and esteemed, and that the said Easton may be forever enjoined and restrained from seeking further to enforce the same, or to claim any benefit thereof as against any of the estate, real or personal, which was of said bankrupt at the time of the commencement of said proceedings in bankruptcy, and that he may have all such further and other relief as to the equity belongs and the circumstances of this case may require.

And may it please your honor to grant unto your orator a writ

16 of subpœna, to be directed to the said Joseph G. Easton, commanding him, upon a day and under a penalty to be fixed therein, personally to appear before this honorable court and then and there full, true, direct, and perfect answer to make to the premises, and further to stand to, perform, and abide such further order, direction, and decree therein as to this honorable court shall seem meet.

DRYDEN AND DRYDEN AND NATHANIEL MEYERS,
Solicitors for Complainant.

And afterwards, to wit, on the 10th day of June, A. D. 1875, there was issued out of the clerk's office of said district court a subpœna in chancery in said case, which said subpœna in chancery is in the words and figures following, to wit:

Subpœna in chancery.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

The President of the United States of America to Joseph G. Easton, greeting:

You are hereby commanded to be and appear at and before the district court of the United States of America, in and for the eastern district of Missouri, at its rooms in the custom-house building, in the city of Saint Louis, in said eastern district, on Thursday, the first day
17 of July, A. D. eighteen hundred and seventy-five, then and there to enter your appearance and answer the bill of complaint of William Dudley, assignee in bankruptcy of William P. Bush, bankrupt, filed in this court on the seventh day of June, A. D. 1875; otherwise upon failure to enter your appearance and answer said bill of complaint on or before said first day of July, the bill may be taken as confessed. Hereof fail not.

Witness the honorable Samuel Treat, judge of the district court of said United States, in and for the eastern district of Missouri, this 10th day of June, in the year of our Lord eighteen hundred and seventy-five. Issued at office in the city of St. Louis, in said district, under the seal of said district court, the day and year last above written.

[SEAL.] JOSEPH H. CLARK,
Clerk of said Court.

And afterwards, to wit, on the 16th day of June, A. D. 1875, there was filed in the clerk's office of said district court a bond for costs in said case, which said bond is in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the district court of the United States in and for said district.

18 Know all men by these presents that we, William Dudley, assignee, James McPike, R. Holtzclaw, sr., Jno. R. Louthan, ex't'r, Walter Louthan, est. John Nichols, Henry Root, Albin J. Dearing, of , and State of Missouri, are held and firmly bound unto the clerk of the district court of the United States for the eastern district of Missouri, in the penal sum of 300 dollars lawful money of the

United States, and for the payment whereof well and truly to be made we bind ourselves, our heirs, executors, and administrators, firmly by these presents, signed with our names and sealed with our seals, and dated this 14th day of June, A. D. 1875.

The condition of the above obligation is such that whereas William Dudley, assignee in bankruptcy of William P. Bush, a bankrupt, a citizen of the State of Missouri, did on the day of June, A. D. 1875, file in the office of the clerk of the district court of the United States for the eastern district of Missouri his bill in chancery against Joseph G. Easton, a citizen of the State of Missouri:

Now, if the said William Dudley, assignee in bankruptcy of William P. Bush, shall well and truly pay or cause to be paid to the
19 defendant in said suit, and to the clerk of said court, and to the marshall of the eastern district of Missouri, and all other officers of said court, and to all witnesses summoned in said suit, all the costs and fees which may accrue and become due to any such defendant, officers, and witnesses, by reason of the prosecution of said suit, then this obligation to be void, otherwise to remain in full force and virtue.

WILLIAM DUDLEY, *Assignee.* [SEAL.]
JAMES McPIKE. [SEAL.]
R. HOLTZCLAW, SR.
JOHN J. LOUTHAN, [SEAL.]
Ex'tr W. Louthan, Est.
JOHN NICHOLS.
HENRY J. ROOT.
ALBIN J. DEARING.

Acknowledged and approved by me this day of 187 .

United States Commissioner for the eastern district of Missouri.

And afterwards, to wit, on the 1st day of July, A. D. 1876, the marshal of the United States of America in and for the eastern district of Missouri, made return on the subpœna in chancery heretofore issued in said case, which said return of said marshal is in the words and figures following, to wit:

Marshal's return.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

20 Executed this writ by delivering a copy of the subpœna together with a copy of the petition to the within-named Joseph G. Easton, at Marion County, within the eastern district of Missouri, June 12th, 1875.

C. A. NEWCOMB,
U. S. Marshal, E. D. Mo.,
By CHAS. P. HEYWOOD, *Deputy.*

And at last mentioned regular stated term of said district court, begun and holden as aforesaid, the following further proceedings took place in this cause on Friday, the ninth day of July, A. D. 1875, to wit:

Demurrer filed.

WILLIAM DUDLEY, ASSIGNEE, &C., COMPLAINANT,
ag'st
JOSEPH G. EASTON, DEFENDANT. } No. 2668. In equity.

This day came the parties, by their respective solicitors, and by consent of said solicitors the said defendant, by his solicitors, files his demurrer to the bill of complaint heretofore filed in this cause.

And the said demurrer filed in said cause is in the words and figures following, to wit:

Demurrer.

WILLIAM DUDLEY, ASSIGNEE, &C., PL'FF,
against
JOSEPH G. EASTON, DEFENDANT.

In the district court of the United States, eastern district of Missouri.

By protestation and not confessing all or any of the matters and things in the plaintiff's bill of complaint to be true in such manner
21 and form as the same are therein set forth and alleged, the said defendant demurs to said bill, and for cause of demurrer shows: That the said bill does not contain any matter of equity whereon this court can ground any decree, or give to the plaintiff any relief against this defendant.

Wherefore and for divers other good causes of demurrer appearing in said bill the defendant demurs thereto and humbly demands the judgment of this court, whether he shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

KRUM AND MADILL,
Sol. for Def't.

The undersigned, of counsel for the defendant in the above and foregoing cause, certify that in our opinion the foregoing demurrer of the defendant is well founded in point of law.

KRUM AND MADILL,
Counsel for Def't.

Affidavit of defendant waived.

DRYDEN AND DRYDEN,
Solicitors for Compl't.

We hereby consent that the within demurrer may be filed this 9th day of July, 1875.

DRYDEN AND DRYDEN AND NATHANIEL MYERS,
Solicitors for Complainant.

22 And afterwards, to wit, at last-mentioned regular stated term of said district court, begun and holden as aforesaid, the following further proceedings took place in this cause, on Thursday, the 22nd day of July, A. D. 1875, to wit:

Demurrer argued and submitted.

WILLIAM DUDLEY, ASSIGNEE, &C., COMPLAINANT,
ag'st
JOSEPH G. EASTON, DEFENDANT.
} No. 2668. In equity.

This day comes the said complainant by John W. Dryden, esquire, his solicitor, and also the said defendant by Chester A. Krum, esquire, his solicitor, and the demurrer heretofore filed by said defendant to the bill of complaint in this cause having been taken up, the same is argued by counsel and submitted to the court, which, not being fully advised in the premises, took further time to consider of its judgment herein.

And afterwards, to wit, at last-mentioned regular stated term of said district court, begun and holden as aforesaid, the following further proceedings took place in this cause, on Monday, the 26th day of July, A. D. 1875, to wit:

Demurrer sustained.

WILLIAM DUDLEY, ASSIGNEE, &C., COMPLAINANT,
ag'st
JOSEPH G. EASTON, DEFENDANT.
} No. 2668. In equity.

23 This day come again the parties by their repective solicitors, and the court having examined the demurrer heretofore filed by said defendant to the bill of complaint in this cause, and being fully advised of and concerning the same, is of opinion that the law on said demurrer is for the said defendant, and in accordance with such opinion now orders that the said demurrer be, and the same is hereby, sustained.

Leave to file an amended bill.

And it is further ordered that the said complainant have leave to file an amended bill of complaint in said cause.

And afterwards, to wit, at last-mentioned regular stated term of said district court, begun and holden as aforesaid, the following further proceedings took place in this case, on Monday, the 27th day of September, A. D. 1875, to wit:

Amended bill filed.

WILLIAM DUDLEY, ASSIGNEE, &C., PLAINTIFF,
ag'st
JOSEPH G. EASTON, DEFENDANT.
} No. 2668. In equity.

This day came the parties by their respective solicitors, and the said complainant by his solicitor, and with the consent of solicitor for defendant files his amended bill of complaint in said cause.

And the said amended bill so filed as aforesaid is in the words and figures following, to wit:

24 *Amended bill.*

WILLIAM DUDLEY, ASSIGNEE IN BANKRUPTCY of the estate of William P. Bush, a bankrupt, complainant, *against* JOSEPH G. EASTON, DEFENDANT.	In equity. Case No. 2668.

In the district court of the United States for the eastern district of Missouri.

The amended bill of said complainant filed herein by leave of court.

And now comes the said complainant, William Dudley, and by leave of court first had and obtained, files this his amended bill against said defendant, Joseph G. Easton, and thereupon your orator complaining says:

That on or about the 10th day of October, 1873, the said defendant, Easton, instituted his certain suit at law against the said William P. Bush in the circuit court of the State of Missouri, in and for the county of Monroe, in said State, by filing on said day in the clerk's office of said court in said county his petition, wherein he alleged in substance that the said Bush and one James G. Longmire, who was also made a defendant in said suit, by their certain promissory note therewith filed, and bearing date the 2nd day of December, 1872, and by them duly made and delivered, had promised to pay to the said James G. Long-
25 mire, or order, three months after the date thereof, the sum of three thousand dollars for value received, with interest after maturity at the rate of ten per centum per annum, and that afterwards said Longmire had endorsed and delivered said note to him, said Easton, for value, and that the same, though due, remained unpaid, and in which petition he also prayed for judgment against said Bush and said Longmire for the amount of said note and all interest and costs, and by also then and there suing out of said clerk's office a writ of summons returnable to the October, 1873, term of said court, and directed to the sheriff of said county of Marion, by which said sheriff was commanded to summon said Bush to answer the said petition, and the said writ coming into the hands of said sheriff was by him on the 10th day of October, and more than fifteen days before the return day thereof, duly served upon the said Bush, and was afterwards by said sheriff, on the return day thereof, duly returned into court.

And your orator further says that at the time of the service of said summons upon said Bush he, said Bush, was greatly embarrassed as to his finances, and although then possessed of a large amount
26 of lands and other property was yet owing a large amount of debts then past due, which he was not then able to pay, and was greatly oppressed and harassed by the demands of several persons, the creditors to whom said debts were owing, as also by the said suit of said Easton, and being so embarrassed and harassed he shortly thereafter, namely, on the 24th day of October, 1873, met, together with divers persons, creditors of him, said Bush, including said defendant Easton, at a public inn, in the city of Palmyra, in the county of Marion, in this district, called the National Hotel, said persons having so assembled there at his request, and then and there in the presence and hearing of said Easton and his said other creditors announced and made known to all there present his embarrassment and insolvent condition, and that he

had been sued by said Easton, and that he had also been sued (as was in fact true) by one Amos J. Stillwell by suit also brought to said October, 1873, term of said Monroe circuit court, and informed and gave those there present to understand that they, said Easton & Still-
27 well, by reason of the bringing of said suits to the said term, to the exclusion of his said other creditors, were about to get an advantage and preference over them in that they alone would get judgments against him at said term, & then and there further requested of them, said Easton and Stillwell, that they should dismiss their said respective suits, & also requested of them & of all said other creditors there present that they should extend the time for the payment of their several demands against him, and proposed to them that if they would so extend the time of payment thereof he would convey all of his property to such persons as they should select as a trustee to secure to them the payment of their several demands equally, with interest on each from that time at the rate of ten per centum per annum.

And your orator further says that thereupon the said creditors there present at said meeting, including said Easton and Stillwell, mutually agreed with each other & said Bush that they would severally extend the time of the payment by him of their said respective demands, and would accept of him in payment and satisfaction of each of their said demands respectively his four promissory notes, each for the one-
28 fourth part of their said respective demands, and payable respectively in one, two, three, and four years from the time of the making thereof, and bearing interest from date at the rate of ten per centum per annum, and to be secured by a deed of trust mortgage, to be made and executed by said William P. Bush and his wife, and conveying all the real property of him, said Bush, unto one Samuel Logan as a trustee, with power in case of a default in the payment of *of* said notes or any of them to sell said realty or any part thereof, and out of the proceeds of such sale to pay all of said notes pro rata in proportion to the amount thereof respectively, and to the end that said arrangement might be made effectual and that said conveyance might be made, they, said Easton and Stillwell, also then and there severally agreed with said Bush and said other creditors and represented unto him and them and gave him and them to understand that they severally would withdraw and dismiss their said respective suits pending in said Monroe circuit court as aforesaid, and would not further prosecute the same or take
29 any judgment therein, and thereupon said Bush also then and there agreed, with all of his said creditors, including said Easton and Stillwell, to make to each of them said four promissory notes for their respective demands as aforesaid, and jointly with his wife to make to said Logan said conveyance of all his said real estate by deed of trust mortgage for the purpose and in the manner aforesaid, so soon as it might reasonably be possible to prepare and execute said notes and deed.

And your orator further says that immediately after the making of said agreement, he, said Bush, set about the work of preparing said notes and deed, and of properly executing and delivering the same to his said respective creditors, and of carrying out said agreement in all respects in good faith on his part, and that relying upon the said agreement and the said assurance and representation of said Easton that he would not further prosecute his said suit, but would dismiss the same, and believing in consequence thereof that it would be necessary for him to attend upon said court at its said October term, or to make any

answer or defence thereto, he did not give any further attention
30 to the said suit, and did not, as prior to the making of said agreement and assurance he had intended to do, and but for such agreement & assurance would have done, attend upon said court during said term, either in person or by any attorney, nor make nor file any answer or other pleading to said petition in the clerk's office of said court within the first three days of said term, but proceeded with as much expedition as the importance of the work to be done and the care and labor necessarily to be bestowed in order properly to prepare and execute said notes & deed would permit to make said notes and deed, and in fact within a reasonable time after the making of said agreement, to wit, at divers times prior to the 5th day of December, 1873, did cause to be prepared, and did sign with his name, ready for delivery, four several promissory notes in favor of each of his said creditors present at said meeting, including said Easton & Stillwell, each of said four notes being for the one-fourth part of the amount remaining unpaid on the 29th day of October, 1873, of the indebtedness owing by him to each of his said creditors respectively, and said notes being all dated on
31 said 29th day of October, 1873, and payable to the order of each of said creditors respectively, in one, two, three, and four years after date respectively, and with interest from date at the rate of ten per centum per annum, and also within said reasonable time, namely, on divers times prior to the said 5th day of December, 1873, did deliver said notes so signed by him to each of his said creditors respectively, excepting only said Easton and Stillwell, said notes being so delivered by him and received by them in satisfaction of their several demands against him, in accordance with the terms of said agreement, and also within said reasonable time, to wit, on said 5th day of December, 1873, jointly with his wife, did sign, seal, and deliver to said Samuel Logan, a good and sufficient deed of trust mortgage, whereby he did convey unto said Logan, clear of the dower of his said wife, all the real property which belonged to him on the said 24th day of October, 1873, being divers tracts of land lying in the counties of Monroe, Ralls, and Marion, in said State, and all fully described in said deed, in trust as provided therein to secure the payment of said new notes so made in favor
32 of each of said creditors, including those to be made to said Easton and Stillwell, as aforesaid, in accordance with the terms of said agreement, and with the power in said Logan in case of any default being made in the payment of the said notes or either of them to sell said lands, or any of them, & out of the proceeds of such sales to pay the said notes pro rata in proportion to their respective amounts, as required by said agreement, all of which will be more fully seen, reference being had to said deed.

And your orator further says that after the making of said agreement he, the said William P. Bush, was at all times ready and willing to deliver to said Easton his four promissory notes duly signed by him, each for the one-fourth part of the indebtedness then due and owing by him to said Easton, and payable respectively in one, two, three, and four years from the time of the said agreement, with interest from date at the rate of ten per centum per annum, and in fact did cause to be prepared and did sign ready for delivery said notes as aforesaid, namely, four notes, each for the sum of ($798.75) seven hundred and ninety-eight $\frac{75}{100}$ dollars, bearing date the 29th day of October, 1873, and
33 payable to the order of said Easton, respectively, in one, two, three, and four years after date with interest from date at the rate of ten per centum per annum, the interest to be paid annually, and

if not so paid, to be added to the principal and bear interest at the same rate, being the same as in said deed to said Logan were described & recited to have been made by him to said Easton, & did also on or about the 2nd day of January, 1874, offer to deliver said notes to said Easton & did request him to accept and receive the same in accordance with his said agreement, but he, the said Easton, then and there refused to receive said notes, or either of them, & refused in any respect to comply with his said agreement, & from thence at all times up to the filing of the petition of creditors against said Bush, as hereinafter set forth, did continue to refuse to receive said notes or to accept any benefit of said deed, pretending & claiming that by reason of the obtaining of the judgment & the levies of the execution issued thereon next hereinafter mentioned he had obtained a priority over the other creditors of said
34 Bush & a preference & advantage in the distribution of his estate, and that he would not release or give up the same.

And your orator further says, that he, the said Bush, would have made such tender long prior to the said second day of January, 1874, but for the reason that he, the said Easton, had, shortly after the making of said agreement, and in violation thereof, prosecuted his said suit to judgment against him as next hereinafter stated, & had theretofore, on or about the 17th day of November, 1873, when applied to by the said Bush & his said other creditors to carry out the said agreement, positively refused and declined so to do, and had then at all times given him and them to understand, & had stated to him & them, that any such tender of performance of said agreement on his or their parts would be of no avail.

And your orator further says, that shortly after the making of said agreement & long before the making of said deed of trust or before a reasonable time for the carrying out of said agreement by said Bush and his other creditors had expired, and in fact upon the first day during said term of said court upon which a judgment by default could
35 be taken in said suit against said Bush for want of an answer or other defence, namely, on the 30th day of October, 1873, he, the said Easton, in violation of his said agreement and in fraud of the rights of said Bush and his said other creditors, without any notice to said Bush of the action which he was about to take, did proceed with the prosecution of said suit, and instead of dismissing the same, did, on said last-mentioned day, take a default therein as well against said Bush as against the other defendant in said suit, said James G. Longmire, and thereupon on said last-mentioned day did cause a final judgment to be entered up by said court in his favor and against said Bush and Longmire, for the sum of three thousand two hundred, and thereby by means of said judgment did obtain a lien upon all the lands of said Bush in the said county of Monroe of which he, the said Bush, had a great quantity, exceeding altogether in value the amount of said judgment, & thereby also obtained a preference to the extent of the amount of said judgment over said other creditors of said Bush, and did deprive and cut off said Bush from setting up said agreement as a matter
36 of defence to said suit as he had the right to have done, and as, but for the said assurance and promise of said Easton that he would voluntarily dismiss and not further prosecute said suit, he in fact would have done.

And your orator further says, that after the rendition of said judgment as aforesaid until the end of said October term of said court no notice was given by said Easton to said Bush that said judgment had so been rendered against him, nor did said Bush have or receive any

notice or information in respect thereto from any source whatever until long after said court had adjourned for said term on the third day of November, 1873, and after said term had on said day fully ended, and until it was too late for him, said Bush, to seek to have said judgment set aside by application to said on motion, according to law & the practice of said court, and so your orator says that in fact no motion was made by said Bush at any time during said term in said court to set aside the said judgment, but that at the close of said term the same became, and from thence was, conclusive and final beyond
37 any power of said Bush or any one to set aside by any proceedings at law.

And your orator further says that after the close of said term and before the making of said deed of trust, to wit, on the 28th day of November, 1873, said Easton sued out of the clerk's office of said Monroe circuit court an execution upon said judgment, directed to any sheriff in the State of Missouri, and caused the same to be placed in the hands of Daniel McLeod, esquire, sheriff of the county of Marion, who thereupon levied upon all of the interest of said Bush in divers lands lying in said county of Marion under said execution; & in order to satisfy the same, & also on said 28th day of November, 1873, sued out of the clerk's office of said court another execution upon said judgment directed to the sheriff of said county of Monroe, and on the 3rd day of December, 1873, caused the same to be placed in the hands of said sheriff of said Monroe County, who thereupon on said day, under and by virtue thereof, levied upon all the interest of said William P. Bush in divers lands in said county of Monroe.

And your orator further says that afterwards, on the 28th day
38 of February, 1874, and before any sale of any of said lands under said executions or either of them, certain of the creditors of said Bush, the aggregate of whose debts exceeded three hundred dollars, filed their petition in this court praying that for divers good causes therein set forth he, said Bush, might be adjudged a bankrupt within the meaning of the act of Congress in that behalf, and, thereafter, such proceedings were had in this court upon said petition as that on the 24th day of March, 1874, he, said Bush, was duly adjudged a bankrupt as prayed, and as that, afterwards, your orator at the first meeting of creditors of said bankrupt, held before Enos Clarke, esq., one of the registers of this court in bankruptcy, on the 14th day of September, 1874, was by the greater part in number & value of the creditors, who had proved their debts, duly chosen to be the assignee of the estate and effects of said bankrupt, and that afterwards on the 6th day of October, 1874, the said election of your orator as assignee having been approved by your honor, a deed of assignment was made to your orator by said register under his hand and the seal of this court, whereby all the estate, real and
39 personal, in which said bankrupt, at the time of the commencement of said proceedings in bankruptcy, was interested or which he was then entitled to have, was conveyed to and vested in your orator as such assignee according to the provisions of the said act.

And your orator further says that he had well hoped that since his said election and qualification as assignee, said defendant Easton would have made proof of his claim against the estate of said bankrupt in this court according to the provisions of said act, and would have accepted the said four notes for ($798.75) seven hundred and ninety-eight and $\frac{75}{100}$ dollars each, so made by said Bush as aforesaid, and the benefit and security of the said deed of trust mortgage so made and delivered to said Logan as aforesaid, and would have surrendered up to your ora-

tor, as such assignee as aforesaid, all benefit and advantage gotten by him in preference of the other creditors of said Bush by means of the said judgment and the levies of executions issued thereon as aforesaid, and would have submitted himself to the jurisdiction of this honorable court for the determination of his demand against the estate of
40 said Bush and the priority, if any, to which he might be entitled in the distribution of said estate; but, now, so it is, may it please your honor, he, said defendant, has not made proof of any debt in this court against the said estate, & has not accepted said notes, or any of them, or any benefit of said deed, nor has he surrendered to your orator the preference so obtained by him by means of said judgment & levies of executions as aforesaid, but has claimed and insisted at all times to your orator and to divers others, the creditors of said bankrupt's estate, that he had and still has a good and valid lien and advantage over other creditors of said bankrupt, and has refused to yield up the same or to accept said notes and the benefit of said deed, and has threatened and still threatens to proceed to enforce the said judgment & the levy of said executions against said real estate, and other property of said estate, to the manifest detriment and disadvantage and in fraud of the said bankrupt and the other creditors of said estate.

And your orator now brings here into court and files herewith the said four promissory notes, each for the said sum of $798.75 *dollars*, so signed by said Bush as aforesaid, and described in said deed, and offers now to deliver the same to said Easton, and is now ready
41 & willing, as he always will be, in all respects to perform and execute said agreement so far as the same remains unperformed by said Bush, and he requests the said Easton to accept said notes and the benefit of said deed of trust and in all things to comply with, execute, and perform on his part his said agreement, as in equity and in good conscience he ought long since to have done.

Wherefore your orator prays that a decree may be made by your honorable court requiring the said defendant specifically to execute and perform said agreement on his part, to accept said notes & the benefit of said trust mortgage in satisfaction of the demand which he had against said Bush on the 29th day of October, 1873, and then sued for in the Monroe circuit court, and to execute to your orator a release of all lien & claim upon any of the real estate which was of said Bush at the time of the commencement of said proceedings in bankruptcy against said Bush which he may have under or by virtue of said judgment of said Monroe circuit court, and that said judgment as to said Bush may be set aside, and for naught held and esteemed, and that he, said defendant Easton, may by said decree be forever enjoined and restrained from
42 enforcing said judgment, or from claiming any benefit or lien thereof as against any property which belonged to said Bush at the time of the rendition thereof, and that he may have all such other and further relief as to equity belongs and the circumstances of his case may require.

And your orator prays that it may please your honor to grant unto him a writ of subpœna to be directed to said Joseph G. Easton, commanding him, upon a day and under a penalty to be fixed therein, personally to appear before this honorable court, and then and there full, true, direct, and perfect answer make to the premises, and further to stand to, perform, and abide such further order, direction, and decree therein as to this honorable court shall seem meet.

DRYDEN AND DRYDEN AND
NATHANIEL MYERS,
Solicitors for Complainants.

Consent is hereby given to the filing of this amended bill, of which we have this day received a copy.
Sept. 27th, 1875.

KRUM AND MADILL,
Solicitors for Respondents.

And afterwards, to wit, at a regular stated term of the district court of the United States in and for the eastern district of Missouri, begun and holden at the city of St. Louis, in said eastern district, on the first Monday, the first day of the month of November, A. D. 1875, the
43 following further proceedings took place in this case, on Monday, the 13th day of December, A. D. 1875, to wit:

Demurrer to amended bill filed.

WILLIAM DUDLEY, ASSIGNEE, &C., COMplainant,
vs.
JOSEPH G. EASTON, DEFENDANT. } No. 2668. In equity.

This day comes the defendant, by Messrs. Krum and Madill, his solicitors, and, with the leave of the court, file their demurrer to the amended bill of complaint heretofore filed in this cause, and the said demurrer so filed as aforesaid is in the words and figures following, to wit:

Demurrer.

In the district court of the United States for the eastern district of Missouri.

WILLIAM DUDLEY, ASSIGNEE OF THE ESTATE in bankruptcy of William P. Bush, a bankrupt, complainant,
against
JOSEPH G. EASTON, DEFENDANT. } In equity. Case No. 2668.

This defendant, by protestation, not confessing all or any of the matters and things in the said complainant's bill to be true in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer showeth:

That the said complainant hath not in and by his said bill made or stated such a case as doth or ought to entitle him to any such relief as is thereby sought and prayed for from or against this defendant,
44 or to any relief whatsoever.

Wherefore this defendant demands the judgment of this honorable court whether he shall be compelled to make any other or further answer to the said bill or any of the matters or things therein contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

KRUM AND MADILL,
Def't's Solicitors.

We certify that in our opinion the foregoing demurrer is well founded in point of law.

KRUM AND MADILL,
For Defendant.

Affidavit waived.

NATHANIEL MYERS &
DRYDEN AND DRYDEN,
For Complainant.

And afterwards, to wit, at last-named regular stated term of said district court, begun and holden as aforesaid, the following further proceedings took place in this case, on Wednesday, the 29th day of December, A. D. 1875, to wit:

Demurrer to amended bill submitted.

WILLIAM DUDLEY, ASSIGNEE, &C., COMplainant,
vs.
JOSEPH G. EASTON, DEFENDANT. } No. 2668. In equity.

This day come the parties, by their respective solicitors, and the demurrer heretofore filed by the said defendant to the amended bill of complaint in this cause having been taken up, the same is argued by
45 counsel and submitted to the court, and the court not being fully advised of and concerning the same, takes further time within which to consider of its judgment thereon.

And afterwards to wit, at said last-mentioned regular stated term of said district court, begun and holden as aforesaid, the following further proceedings took place in this case on Friday, the 31st day of December, A. D. 1875, to wit:

Demurrer to amended bill sustained.

WILLIAM DUDLEY, ASSIGNEE, &C., COMPLAINant,
ag'st
JOSEPH G. EASTON, DEFENDANT. } No. 2668. In equity.

This day come again the parties by their respective solicitors, and the court having examined the questions of law arising upon the demurrer heretofore filed by said defendant to the amended bill of complaint in this cause, and being fully advised of and concerning the premises, is of opinion that the law upon said demurrer is for the said defendant, and in accordance with such opinion, now orders that the said demurrer be, and the same is hereby, sustained.

And afterwards, to wit, at last-mentioned regular stated term of said district court begun and holden as aforesaid, the following further proceedings took place in this case on Saturday, the 15th day of January, A. D. 1876, to wit:

46 *Second amended bill filed by leave; leave to join other def'ts.*

WILLIAM DUDLEY, ASSIGNEE, &C., COMPLAINant,
ag'st
JOSEPH G. EASTON, AMOS J. STILLWELL, SAMuel Logan, William P. Bush, and Emma C. Bush, defendants. } No. 2668. In equity.

This day comes the said complainant, by John W. Dryden, esquire, his solicitor, and on motion of said solicitor it is ordered that said com-

plainant have leave to file forthwith his second amended bill of complaint in this cause, and on like motion it is also ordered that said complainant have leave to join Amos J. Stillwell, Samuel Logan, William P. Bush, and Emma C. Bush, as defendants in said cause, and thereupon the complainant files his second amended bill of complaint herein.

Order for subpœna vs. new def'ts.

And on further motion of complainant by his said solicitor, it is further ordered that a subpœna in chancery be issued in this cause against the said defendants, Amos J. Stillwell, Samuel Logan, William P. Bush, and Emma C. Bush, requiring them and each of them to enter their appearance herein and answer the said bill of complaint on or before Thursday, the seventeenth day of the month of February next (1876).

47 *Further time to Easton to plead.*

And on the motion of defendant Joseph G. Easton, by his solicitor, it is further ordered that the said defendant have further time until Thursday, the seventeenth day of February next (1876), to plead or answer to the said second amended bill of complaint this day filed in said cause.

And the said second amended bill of complaint so filed as aforesaid, on said 15th day of January, A. D. 1876, is in the words and figures following, to wit:

Second amended bill of complaint.

In the district court of the United States for the eastern district of Missouri.

WILLIAM DUDLEY, ASSIGNEE OF THE ESTATE in bankruptcy of William P. Bush, a bankrupt, complainant, *against* JOSEPH G. EASTON, AMOS J. STILLWELL, Samuel Logan, William P. Bush, and Emma C. Bush, his wife, defendants.	In equity. Case No. 2668.

The second amended bill of complaint of complainant filed herein by leave of court.

And now comes the said complainant, William Dudley, and by leave of court first had and obtained, files this his second amended bill against the said defendant Joseph G. Easton, and also against Amos J. Stillwell, Samuel Logan, William P. Bush, and Emma C. Bush, his wife, who are now added as defendants herein, and thereupon your orator, complaining, says:

That on or about the 10th day of October, A. D. 1873, the said
48 defendant, Easton, instituted his certain suit at law against the said William P. Bush in the circuit court of the State of Missouri in and for the county of Monroe, in said State, by filing on said day in the clerk's office of said court, in said county, his petition, wherein he alleged in substance that the said Bush and one James Longmire, by their certain promissory note therewith filed and bearing date the second day of December, A. D. 1872, and by them duly made and delivered,

had promised to pay to the said James G. Longmire, or order, three months after the date thereof, the sum of three thousand dollars, for value received, with interest after maturity at the rate of ten per centum per annum, and that afterwards said Longmire had endorsed and delivered said note to said Easton for value, and that the same, though due, remained unpaid, and in which petition he also prayed for judgment against said William P. and said Longmire for the amount of said note, and all interest and costs, and by also then and there suing out of said clerk's office a writ summons returnable to the October, 1873, term of said court, directed to the sheriff of said county, by which the said
49 sheriff was commanded to summon said William P. to answer the said petition; and the said writ coming into the hands of said sheriff, was by him on the said 10th day of October, and more than fifteen days before the return thereof, duly served upon the said William P., and was afterwards by said sheriff on the return day thereof duly returned into court.

And your orator also further says, that on or about said 10th day of October, A. D. 1873, the defendant, Stillwell, instituted his certain suit at law against said William P. in the said circuit court for the county of Monroe, by filing on said day in the clerk's office of said court his petition wherein he alleged, in substance, that the said William P. and one James G. Longmire, by their certain promissory note therewith filed and bearing date the 23rd day of December, A. D. 1872, and by them duly made and delivered, had promised to pay to said William P. or order, on the first day of October, 1873, the sum of five thousand dollars for value received, with interest after maturity at the rate of ten per centum per annum and that afterwards said Bush had endorsed and delivered said note to him, said Stillwell for value, and that
50 the same, though due, remained unpaid, and in which petition he also prayed for judgment against said Bush for the amount of said note and all interest and costs, and by also then and there suing out of said clerk's office a writ of summons returnable to the October, 1873, term of said court and directed to the sheriff of said county, by which the sheriff was commanded to summon said William P. to answer said Stillwell's petition; and the said writ coming into the hands of said sheriff, was by him on the said 10th day of October, and more than fifteen days before the return day thereof, duly served upon said William P., and was afterwards by said sheriff, on the return day thereof, duly returned into court.

And your orator further says that at the time of the service of said writs of summons upon said Bush, he, said Bush, whose advocation was then that of a farmer, was greatly embarrassed as to his finances, and although then possessed of a large amount of lands and other property amounting in value to more than the aggregate of his liabilities, was yet owing a large amount of debts then past due which he was not then able to pay, and was greatly oppressed and harassed by
51 the demands of divers persons, the creditors to whom said debts were owing, as also by the said suits of said defendants, Easton and Stillwell, and being so embarrassed he shortly thereafter, to wit, on the 24th day of October, 1873, met, together with divers persons, creditors of him, said Bush, including said defendants, Easton and Stillwell, at a public inn in the city of Palmyra, in Marion County, in this district, said persons having so assembled there at his request, and then and there, in the presence and hearing of said Easton and Stillwell and his said other creditors there present, announced and made known to all there present his insolvent condition and that he had been sued by

said Easton and Stillwell as aforesaid, and gave those there present that they, said Easton and Stillwell, by reason of the bringing of said suits to said term to the exclusion of his said other creditors, were about to get an advantage and preference over them in that they alone would get judgments against him at said term, and then and there further requested of them, said Easton and Stillwell, that they should dismiss their said respective suits,and also requested of them and all of said other creditors there present, that they should extend the time for the
52 payment of their several demands against him, and proposed to them that if they would so extend the time of payment thereof he would convey all his real property to such persons as they should select as trustee to secure to them the payment of their several demands equally, with interest on each from that time at the rate of ten per centum per annum.

And your orator further says, that thereupon the said creditors then present at said meeting, including said Easton and Stillwell, mutually agreed with each other and said Bush, that they would severally extend the time of the payment by him of their respective demands, and would accept from him in payment and satisfaction of each of their said demands, respectively, his four promissory notes, each for the one-fourth part of their said respective demands, and payable respectively in one, two, three, and four years from the time of the making thereof, and bearing interest from date at the rate of ten per centum per annum, and to be secured by a deed of trust mortgage, to be made and executed by said William P. Bush and Emma C. Bush, his wife, and conveying all the real property of him, said Bush, and the dower in-
53 terest of his wife therein, unto the defendant Logan as a trustee, with power, in case of a default in the payment of said notes or any of them, to sell said realty or any part thereof, and out of the proceeds of such sale to pay all of said notes pro rata, in proportion to the amounts thereof respectively, and to the end that said arrangement might be made effectual, and that said conveyance might be made. They, said Easton and Stillwell, then and there, also severally agreed with said Bush and said other creditors, and represented unto him and them, and gave him and them to understand, that they severally would withdraw and dismiss their said respective suits pending in said Monroe circuit court as aforesaid, and would not further prosecute the same, or take any judgment therein; and thereupon said William B. also then and there agreed with all of his said creditors, including said Easton and Stillwell, to make to each of them said four promissory notes for their respective demands as aforesaid, and jointly with his wife to make to said Logan said conveyance of all his said real estate, and of his said wife's dower interest therein, by deed of trust mort-
54 gage, for the purposes and in the manner aforesaid, so soon as it might be reasonably *be* possible to prepare and execute said notes and deed.

And your orator further says, that immediately after the making of said agreement he, said Bush, set out the work of preparing said notes and deed, and of properly executing and delivering the same to his said respective creditors, and of carrying out said agreement in all respects in good faith on his part, and that, relying upon the said agreement and the said assurance and representation of said Easton and Stillwell, that they would not further prosecute their said suits, but would dismiss the same, and believing, in consequence thereof, that it would be unnecessary for him to attend upon said court at its said October term, or to make any answer or defence thereto, he did not give any further at-

tention to the said suits or either of them, and did not, as prior to the making of said agreement and assurance he had intended to do, and but for such agreement and assurance he would have done, attend upon said court during the said term, either in person or by any attorney, nor make nor file any answer or other pleading to said
55 petitioners or either of them in the clerk's office of said court within the first three days of said term, but proceeded, with as much expedition as the importance of the work to be done and the care and labor necessary to be bestowed in order properly to prepare and execute said notes and deed would permit, to make said notes and deed, and in fact within a reasonable time after the making of said agreement, to wit, at divers times prior to the 5th day of December, 1873, did cause to be prepared and did sign with his name ready for delivery four several promissory notes in favor of each of his said creditors present at said meeting, including said Easton and Stillwell, each of said four notes being for the one-fourth part of the amount remaining unpaid on the 29th day of October, 1873, of the indebtedness owing by him to each of his said creditors respectively, and said notes being all dated on the said 29th day of October, 1873, and payable to the order of each of said creditors respectively in one, two, three, and four years after date respectively, and with interest from date at the rate of ten per centum per annum, and also within said reasonable time, namely,
56 on divers times prior to said 5th day of December, 1873, did deliver said notes so signed by him to each of his said creditors respectively, excepting only said Easton and Stillwell, said notes being so delivered by him and received by them in satisfaction of their several demands against him in accordance with the terms of said agreement, and also within said reasonable time, to wit, on said 5th day of December, 1873, jointly with his said wife, defendant herein, did sign, seal, and deliver unto said defendant Logan a good and sufficient deed of trust mortgage, whereby he and his said wife did convey unto said Logan, clear of the dower of his said wife, all the real estate which belonged to him on said 24th day of October, 1873, being divers tracts of land lying in the counties of Monroe, Ralls, and Marion in said State, and all fully described in said deed, in trust as provided therein to secure the payment of said new notes so made in favor of each of said creditors, including those to be made to said Easton and Stillwell as aforesaid, in accordance with the terms of said agreement, and with power thereby given to said Logan, in case of any default being made
57 in the payment of said notes or either of them, to sell said lands or any of them, and out of the proceeds of such sales to pay the said notes pro rata in proportion to their respective amounts, as required by said agreement, all of which will more fully appear, reference being had to the said deed or to the record thereof, the same having been duly filed for record in the office of the recorder of said Monroe County, on the 13th day of January, 1874, and in the office of the recorder of said Marion County, on the 28th day of January, 1874, and being recorded in said Monroe County recorder's office, in book vol. 5, at pages 266, 267, and in said Marion County recorder's office, in book vol. 66, at pages 187 to 189, and having been filed for record in the recorder's office of said Ralls County, on the day of 187 , and being recorded therein in book at page .

And your orator further says, that after the making of said agreement, he, said William P. Bush, was at all times ready and willing to deliver to said Easton and Stillwell respectively his four promissory

notes duly signed by him, each for the one-fourth part of the
58 indebtedness then due and owing by him to said Easton and Stillwell respectively, and payable respectively in one, two, three, and four years from the time of the said agreement, with interest from their date at the rate of ten per cent. per annum, and in fact did cause to be prepared said notes as aforesaid, namely, for said Easton four notes, each for the sum of 789.75 dollars, and for said Stillwell four other notes, each for the sum of 1,260$\frac{25}{100}$ dollars, all bearing date the 29th day of October, A. D. 1873, and payable to the order of said Easton and said Stillwell respectively in one, two, three, and four years respectively after date, with interest from date at the rate of ten per centum per annum, the interest to be paid annually, and if not so paid to be added to the principal and bear interest at the same rate, all of said notes being the same as in said deed to said Logan were described and recited to have been made by said William P. to said Eastop and Stillwell respectively; and did also on or about the second day of January, A. D.
59 1874, offer to deliver said notes to said Easton and Stillwell respectively, and did request them to receive and accept the same respectively in accordance with their said agreement, but they, the said Easton and Stillwell, then and their severally refused to receive said notes or either of them, and refused in any respect to comply with their said agreement, and from thence at all times up to the filing of the petition of creditors against said William P., as hereinafter set forth, did continue to refuse to receive said notes or to accept any benefit of said deed, they and each of them pretending and claiming that by reason of the obtaining of the judgments and the levies of executions issued thereon next hereinafter mentioned, they had severally obtained a priority over the other creditors of said Bush and a preference and advantage in the distribution of his estate, and that they would not release or give up the same.

And your orator further says that the said Bush would have made such tender and offer of said notes to said Easton and Stillwell
60 respectively long prior to the said second day of January, 1874, but for the reason that they, the said Easton and Stillwell, had, shortly after the making of said agreement, and in violation thereof, prosecuted their said suits to judgment against him as next hereinafter stated, and had theretofore, on or about the 17th day of November, 1873, when applied to by the said Bush and his said other creditors to carry out the said agreement, positively refused and declined so to do, and had then and at all times given him and them to understand that any such tender of performance of said agreement on his or their parts would be of no avail.

And your orators further says that shortly after the making of said agreement, and long before the making of said deed of trust, or before a reasonable time for the carrying out of said agreement by said Bush and his said other creditors had expired, and in fact upon the first days during said term of said court, upon which judgments by default could be taken in the said suits respectively against said Bush for want
61 of an answer or other defense thereto, namely, on the 30th and 31st days of October, 1873, they, said Easton and Stillwell, in violation of their said agreement and in fraud of the rights of said Bush and his said other creditors, without any notice to said Bush of the action which they were severally about to take, did severally proceed with the prosecution of said suits, and instead of dismissing the same did severally, on said last-mentioned day, take defaults in their said suits against said Bush, and thereupon, on said last-mentioned day, did cause final judgments to be entered up by said court in their favor respectively

and against said Bush, that is to say, a judgment in favor of said Easton for the sum of three thousand two hundred dollars, and a judgment in favor of said Stillwell for the sum of 5,041 $\frac{60}{100}$ dollars, and thereby, by means of said judgments, did each of them obtain a lien upon all of the lands of said Bush in said Monroe County, of which he, said Bush,
62 had a great quantity, exceeding altogether in value the amount of said judgments, and thereby also severally obtaining a preference to the extent of the amount of their said respective judgments over said other creditors of said Bush, and did deprive and cut off said Bush from setting up said judgment as a matter of defence to said suits respectively, as he had the right to have done, and as, but for the said assurance and promise of said Easton and Stillwell that they would voluntarily dismiss and not further prosecute said suits, he would in fact have done.

And your orator further says that, after the rendition of said judgments as aforesaid until the end of said October term of said court, no notice was given by said Easton or Stillwell to said Bush that said judgments, or either of them, had been so rendered against him, nor did said Bush have or receive any notice or information in respect thereto from any source whatever until long after said court had adjourned for said term, on the third day of November, 1873, and after
63 said term had on said day fully ended, and until it was too late for him, said Bush, to seek to have said judgments set aside by application to said court on motion according to law and the practice of said court, and so your orator says that in fact no motion was made by said Bush at any time during said term in said court to set aside the said judgments or either of them, but that at the close of said term the same became and from thence were conclusive and final beyond any power of said Bush or any one to set aside by any proceedings at law. And your orator further says that after the close of said term, and before the making of said deed of trust, to wit, on the 28th day of November, 1873, said Easton and Stillwell severally sued out of the clerk's office of said Monroe circuit court executions upon said judgments in their favor respectively directed to any sheriff in the State of Missouri, and caused the same to be placed in the hands of Daniel McLeod,
64 esq., sheriff of the county of Marion, who thereupon levied upon all of the interest of said Bush in divers lands lying in said county of Marion under said execution, and in order to satisfy the same, and also on said 28th day of November, 1873, severally sued out of the clerk's office of said court executions upon said judgments respectively directed to the sheriff of said county of Monroe, and on the third day of December, 1873, caused the same to be placed in the hands of said sheriff of Monroe County, who thereupon, on said day, under and by virtue thereof levied upon all the interest of said William P. Bush in divers lands in said county of Monroe.

And your orator further says that afterwards, on the 28th day of February, 1874, and before any sale of any of said lands under said executions, or either of them, certain of the creditors of said Bush, whose debts in the aggregate exceeded three hundred dollars, filed in
65 this court their petition, praying that for divers good causes therein set forth he, said Bush, might be adjudged a bankrupt within the meaning of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2nd, 1867, and thereafter such proceedings were had in this court upon said petition as that on the 24th day of March, 1874, he, said Bush, was duly adjudged a bankrupt, as prayed, and as that after-

wards your orator, at the first meeting of the creditors of said bankrupt, held before Enos Clarke, esq., one of the registers of this court in bankruptcy, on the 14th day of September, 1874, was, by the votes of the greater part in number and value of the creditors who had proved their debts, duly chosen to be the assignee of the estate and effects of said bankrupt; and as that afterwards, on the 6th day of October, 1874, the said election of your orator as assignee having been approved by your honor, a deed of assignment was made to your orator by said reg-
66 ister under his hand and the seal of this court, whereby all the estate, real and personal, in which said bankrupt at the time of the commencement of proceedings in bankruptcy was interested, or which he was then entitled to have, was conveyed to and vested in your orator, as such assignee, according to the provisions of said act.

And your orator further says that he had well hoped that since his election and qualification as assignee they, said Easton and Stillwell, would have surrendered up to him, as such assignee, all benefit gotten by them by virtue of said judgments and executions, and would have accepted said notes so tendered them by said Bush as aforesaid, and the benefit of said deed, but now so it is they, said Easton and Stillwell, have not at any time made any surrender or release to your orator of the liens and advantage of their said respective judgments and executions, but have at all times insisted, and do still insist, and claim to your orator and others that their said
67 judgments and executions are valid, and that by virtue thereof they are entitled to an advantage in the distribution of the estate of said Bush over the other creditors thereof, and have refused to yield up the same or to accept said notes so tendered to them respectively or the benefit of said deed, and have threatened and still threaten to proceed to enforce the said judgments and the levies of said executions against said real estate and other property of said estate, to the manifest detriment and disadvantage and in fraud of the said bankrupt and the other creditors of said estate.

And your orator now brings here into court and files herewith the said four promissory notes, each for the said sum of 798$\frac{75}{100}$ dollars, so signed by said Bush as aforesaid, and described in said deed, and offers now to deliver the same to the defendant Easton, and also brings and files here-
with the said four other notes, each for the sum of 5,041.60 dollars,
68 so signed and described in said deed as aforesaid, and offers now to deliver the same to said Stillwell, and is now ready and willing as he always will be in all respects to perform and execute said agreement, so far as *as* the same remains unperformed by said Bush, and he now requests the said Easton and Stillwell to accept respectively the said notes and the benefit of said deed of trust, and in all things to comply with, execute, and perform on their part respectively their agreement as in equity and good conscience they ought long since to have done.

And your orator further says that at the time of the making of said agreement of extension and of said deed of trust said Bush had a large amount of property, not included or intended to be included in said deed, sufficient in value to satisfy all the debts owing by said Bush to his other creditor', who were not parties to said agreement; that said deed was not made, nor was said agreement entered into, by said Bush with any intent to give a preference thereby to the parties to said agree-
ment or any of them over his other creditors, or with the intent
69 thereby to convey his said property or any of it in fraud of the provisions of said act of Congress or the acts amendatory thereof,

but solely under the belief on the part of said Bush that by obtaining such extension of time of payment as aforesaid he would be enabled to pay all his creditors their debts in full, together with interest at the rate of ten per centum per annum; that the entire indebtedness secured by said deed of trust, including that to said Stillwell and Easton, amounted to 40,394.70 dollars, and that all the lands mentioned in said deed were then thought to be worth, and in fact were worth, the sum of 50,000 dollars, especially if a reasonable time could be obtained to negotiate a sale of the same; that among the property described in said deed of trust was that occupied by said Bush and his family as a homestead, out of which he was entitled to have set apart to him as exempt from levy and sale under execution a homestead of the value of
70 1,500 dollars under the laws of this State; that because of the release of the dower interest of the defendant, Emma C. Bush, wife of said bankrupt, in all of his said lands described in said deed, and the waiver and conveyance of all his right to exemption of a homestead given and made by said deed, and for other good and sufficient reasons, it is to the interest of all of the creditors of said bankrupt's estate, save only said Easton and Stillwell, that the said deed of trust should be recognized, confirmed, and enforced by your orator as assignee as aforesaid, and in fact this bill is filed by your orator at the request and by the direction and on the behalf of all the creditors of said Bush, whether secured or unsecured, excepting only said Easton and Stillwell.

Wherefore your orator prays that a decree may be made by your honorable court requiring the said defendants Easton and Stillwell on their part respectively to execute and perform said agreement, to accept said notes and the benefit of said trust mortgage respectively
71 in satisfaction of the demands which they respectively had against said William P. Bush on the 29th day of October, 1873, and then sued for in the said Monroe circuit court, and severally to execute to your orator a release of all lien and claim upon any real estate which was of said Bush at the time of the commencement of said proceedings in bankruptcy against said Bush, which they respectively may have under or by virtue of said several judgments of said Monroe circuit court, or under or by virtue of the levy of any execution issued thereon, and that said judgments as to said Bush may be set aside and for naught held and esteemed respectively, and that the said defendants Easton and Stillwell may by said decree be forever enjoined and restrained from enforcing said judgments respectively or from claiming any benefit or lien thereof as against any property which belonged to said Bush at the time of the rendition thereof, and that he may have all such
72 other and further relief as to equity belongs and the circumstances of his case may require.

And may it please your honor to grant unto your orator a writ of subpœna to be directed to said Joseph G. Easton, Amos J. Stillwell, Samuel Logan, Emma C. Bush, and William P. Bush, her husband, commanding them, and each of them, under a penalty to be fixed therein, personally to appear before this honorable court and then and there full, true, direct, and perfect answer make to the premises, and further to stand to, perform, and abide such further order, direction, and decree therein as to this honorable court may seem meet.

NATHANIEL MYERS, DRYDEN AND DRYDEN,
Solicitors for Complainants.

And afterwards, to wit, on the 19th day of January, A. D. 1876, there

was issued out of the clerk's office of the district court of the United States for the eastern district of Missouri a subpœna in chancery in this case, which said subpœna is in the words and figures following, to wit:

73 *Subpœna in chancery.*

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

The President of the United States of America to Amos J. Stillwell, Samuel Logan, William P. Bush, and Emma C. Bush, his wife, greeting:

You are hereby commanded to be and appear at and before the district court of the United States of America in and for the eastern district of Missouri, at its rooms, in the custom-house building, in the city of Saint Louis, in said eastern district, on Thursday, the seventeenth day of February, A. D. eighteen hundred and seventy-six, then and there to enter your appearance and answer the second amended bill of complaint of William Dudley, assignee in bankruptcy of William P. Bush, bankrupt, complainant, filed in this court on the fifteenth day of January, A. D. 1876, otherwise, upon failure to enter your appearance and answer said bill of complaint on or before said seventeenth day of February, the said bill may be taken as confessed. Hereof fail not.

Witness the honorable Samuel Treat, judge of the district court
74 of said United States in and for the eastern district of Missouri, this nineteenth day of January, in the year of our Lord eighteen hundred and seventy-six.

Issued at office, in the city of Saint Louis, in said district, under the seal of said district court, the day and year last above written.

JOSEPH H. CLARK,
Clerk of said Court.

And afterwards, to wit, on the 17th day of February, A. D. 1876, the marshal of the United States for the eastern district of Missouri made return on said subpœna in chancery in the words and figures following, to wit:

Marshal's return.

Executed this writ by leaving a copy thereof with Amon J. Stillwell, at Hannibal, Mo., by leaving a copy with Samuel Logan, at Palmyra, Mo., by leaving a copy with Emma C. Bush, at Monroe City, Mo.; also left with Emma C. Bush, for Wm. P. Bush, one copy of this return at his residence on this 27th day of January, 1876.

[L. S.] H. W. LEFFINGWELL,
U. S. Marshal,
By WM. DISBROW, *Deputy.*

And afterwards, to wit, at a regular stated term of the district court of the United States for the eastern district of Missouri, begun and
75 holden at the city of Saint Louis, in said eastern district, on the first Monday, the first day, of November, A. D. eighteen hundred and seventy-five, the following further proceedings took place in this cause, on Tuesday, the fourteenth day of March, A. D. eighteen hundrod and seventy-six, to wit:

Demurrers to 2nd amended bill filed.

WILLIAM DUDLEY, ASSIGNEE, &C., COMplainant, *ag'st* JOSEPH G. EASTON ET AL., DEFENDants. } No. 2668. In equity.

This day came the defendants, Joseph G. Easton and Amos J. Stillwell, by Messrs. Krum and Madill, their solicitors, and with the leave of the court file their separate demurrers to the second amended bill of complaint heretofore filed by said complainant in this cause.

And the said demurrer of said Joseph G. Easton so filed is in the words and figures following, to wit:

Demurrer of Easton.

In the district court of the United States for the eastern district of Missouri. In bankruptcy.

WILLIAM DUDLEY, ASSIGNEE, &C., *vs.* JOSEPH G. EASTON ET AL. } No. 2668. In equity.

The demurrer of the defendant, Joseph G. Easton, to the second amended bill of said plaintiff.

Leave of court first having been had, the said defendant by
76 protestation, not confessing or acknowledging all or any of the matters and things in the said second amended bill to be true, in such manner and form as the same are therein set forth and alleged, does demur thereto, and for cause of demurrer shows:

That the said plaintiff has not, in and by his said second amended bill, made or stated such a case as does or ought to entitle him to any such relief as is thereby sought and prayed for from and against this defendant; that it appears by the said second amended bill that certain creditors, who are not named in said second amended bill, but who are alleged to have been present at the meeting of creditors alleged therein, are necessary parties to said second amended bill, inasmuch as the plaintiff shows a state of facts which, to enable a court of equity to accomplish the ends of justice, requires the joinder of all creditors who participated in the agreement which led to the execution of the deed of trust and notes described in said second amended bill.

77 Wherefore this defendant prays the judgment of this honorable court, whether he shall be compelled to make any further or other answer to the said second amended bill, or any of the matters and things therein contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

KRUM AND MADILL,
Solicitors for Defendant.

We certify that in our opinion the foregoing demurrer is well founded in point of law.

KRUM AND MADILL,
For Defendant.

Affidavit waived.

DRYDEN & DRYDEN & MYERS,
For Plaintiff.

And the said demurrers of Amos J. Stillwell, so filed, is in the words and figures following, to wit:

Demurrer of Stillwell.

In the district court of the United States for the eastern district of Missouri. In bankruptcy.

WILLIAM DUDLEY, ASSIGNEE, &C., *vs.* JOSEPH G. EASTON. } No. 2668. In equity.

The demurrer of the defendant, Amos J. Stillwell, to *to* the second amended bill of said plaintiff.

Leave of court first having been had, the said defendant by protestation, not confessing or acknowledging all or any of the matters
78 and things in the said second amended bill to be true in such manner and form as the same are therein set forth and alleged, does demur thereto, and for cause of demurrer shows:

That the said plaintiff has not in and by his said second amended bill made or stated such a case as does or ought to entitle him to any such relief as is thereby sought and prayed for from or against this defendant. That it appears by the said second amended bill, that certain creditors who are not named in said second amended bill, but who are alleged to have been present at the meeting of creditors alleged therein, are necessary parties to said second amended bill inasmuch as the plaintiff shows a state of facts which, to enable a court of equity to accomplish the ends of justice, requires the joinder of all creditors who participated in the agreement which led to the execution of the deed of trust and notes described in said second amended bill.

79 Wherefore this defendant prays the judgment of this honorable court whether he shall be compelled to make any further answer to the said second amended bill or any of the matters and things therein contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

KRUM & MADILL,
Solicitors for Defendant.

We certify that, in our opinion, the foregoing demurrer is well founded in point of law.

KRUM & MADILL,
For Defendant.

Affidavit waived.

DRYDEN & DRYDEN, & MYERS,
For Pl'ff.

Afterwards, to wit, at last mentioned regular stated term of said district court, begun and holden as aforesaid, the following further proceedings took place in this case on Monday, the 3rd day of April, A. D. 1876, to wit:

Demurrers to 2nd amended bill overruled.

WILLIAM DUDLEY, ASSIGNEE, &C., PLAINTIFF, *ag'st* JOSEPH G. EASTON ET AL., DEFENDANTS. } No. 2668. In equity.

This day come the parties, by their respective solicitors, and the sep-

arate special demurrers heretofore filed by the defendants, Joseph G. Easton and Amos J. Stillwell, to the second amended bill of com-
80 plaint in this cause having been argued by counsel and submitted to the court, the court, on consideration thereof and being fully advised of and concerning the same, is of opinion that the law on said demurrers is for said complainant, and in accordance with such opinion now orders that the said demurrers be, and the same are hereby, overruled.

And on the motion of said defendants, by their solicitors, it is ordered that the said defendants have leave to file a general demurrer to the said second amended bill of complaint filed by said complainant herein.

And afterwards, to wit, at last mentioned regular stated term of said district court, begun and holden as aforesaid, the following further proceedings took place in this case on Thursday, the sixth day of April, A. D. 1876, to wit:

Demurrer to 2d amended bill filed.

WILLIAM DUDLEY, ASSIGNEE, &C., COMPLAINANT, *ag'st* JOSEPH G. EASTON ET AL., DEFENDANTS. } No. 2668. In equity.

This day come the defendants, Joseph G. Easton and Amos J. Stillwell, by Messrs. Krum & Madill, their solicitors, and file their
81 general demurrer to the second amended bill of complaint heretofore filed in this cause in accordance with the leave of the court heretofore granted them herein.

And the said demurrer so filed to said second amended bill of complaint is in the words and figures following, to wit:

Demurrer to second amended bill of complainant.

In the district court of the United States in and for the eastern district of Missouri.

WILLIAM DUDLEY, ASSIGNEE IN BANKRUPTCY of Wm. P. Bush, bankrupt, *against* JOSEPH G. EASTON ET AL. } In chancery.

These defendants, Jos. G. Easton & A. J. Stillwell, by protestation not confessing or acknowledging all or any of the matters and things in said second amended bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, do, by leave of court, demur in law to the said second amended bill, and for cause of demurrer show that the complainant hath not by his said second amended bill made such a case as entitled him in a court of equity to any discovery or relief from or against these defendants
82 touching the matters contained in the said bill or any of such matters:

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, these defendants do demur to the said second amended bill, and to all the matters and things therein contained, and pray the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill, and they

humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

KRUM & MADILL,
Sol. for Defendants.

Affidavit waived.

DRYDEN & DRYDEN, & NATH'L MEYERS,
For Complainant.

We certify that in our opinion the foregoing demurrer is well founded in point of law.

KRUM & MADILL,
For Defendants.

And afterwards, to wit, at a regular stated term of the district court of the United States for the eastern district of Missouri, begun and holden at the city of St. Louis, in said eastern district, on the first Monday, the first day of May, A. D., 1876, the following further pro-
83 ceedings took place in this cause on Saturday, the 6th day of May, A. D. 1876, to wit:

Demurrer to 2nd amended bill sustained.

WILLIAM DUDLEY, ASSIGNEE, &C. COMplainant, *ag'st* JOSEPH G. EASTON ET AL., DEFENDants.	No. 2668.	In equity.

This day come again the parties by their respective solicitors, and the demurrer heretofore filed by the defendants, Joseph G. Easton and Amos J. Stillwell, to the second amended bill of complaint in this cause having been taken up, the same is argued by counsel and submitted to the court, and the court having examined the question of law arising upon the said demurrer, and being fully advised of and concerning the same, is of opinion that the law on said demurrer is for the said defendants, and in accordance with such opinion now orders that the said demurrer be and the same is hereby sustained.

Dismissal of bill of complaint.

And the said complainant electing to stand on the judgment so rendered by the court on the said demurrer, and not asking further to amend his bill of complaint herein, it is thereupon by the court
84 ordered, adjudged, and decreed that the said second amended bill of complaint filed by said complainant herein be and the same is hereby now dismissed, and that the said William Dudley, as assignee in this cause, pay the costs of said cause to be taxed.

Appeal allowed.

And thereupon, on motion of Messrs. Dryden & Dryden, solicitors for said complainant, it is ordered that an appeal of this cause from this court to the circuit court of the United States in and for the eastern district of Missouri be and hereby is allowed the said complainant in said cause.

Order for bond for costs.

And it is further ordered that the said complainant execute and file a bond for costs on said appeal in the sum of one hundred dollars.

And afterwards, to wit, at last mentioned regular stated term of said district court, begun and holden as aforesaid, the following further proceedings took place in this cause on Friday, the 12th day of May, A. D. 1876, to wit:

Appeal bond filed and approved. Transcript ordered.

WILLIAM DUDLEY, ASSIGNEE, &c., COMPLAINANT, *ag'st* JOSEPH G. EASTON ET AL., DEFENDANTS. } No. 2668. In equity.

85 This day comes the said complainant, by his solicitors, and files and presents to the court his bond for costs on appeal in this cause in the sum of one hundred dollars, and on consideration thereof the court approves the said bond and the surety therein, and orders that a transcript of the record and proceedings in said cause be made out and certified and transmitmed to the court *court* of the United States of America in and for the eastern district of Missouri at the next regular stated September term (1876) thereof.

And the said bond so filed is in the words and figures following, to wit:

Bond.

Know all men by these presents that I, William Dudley, as assignee in bankruptcy of Wm. P. Bush, a bankrupt, am held and firmly bound to Amos J. Stillwell and Joseph G. Easton in the full and just sum of one hundred dollars, to be paid to the said Stillwell and Easton, their heirs, executors, administrators, or assigns, to which payment well and truly to be made I bind myself and my successors by these pres-
86 ents. Sealed with my seal and dated this day of May, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas lately, at the May term, 1876, of the district court of the United States for the eastern district of Missouri, in a suit depending in said court, between William Dudley, assignee in bankruptcy of William P. Bush, plaintiff, and Amos J. Stillwell, Joseph G. Easton & others, defendants, judgment was rendered against the said plaintiff, and the said plaintiff having appealed from said judgment to the U. S. circuit court for the eastern district of Missouri to reverse the judgment in the aforesaid suit:

Now the condition of the above obligation is such, that if the said William Dudley, assignee as aforesaid, shall answer all costs if he fail to make good his appeal, then the above obligation to be void, else to remain in full force and virtue.

WILLIAM DUDLEY, *Assignee.* [SEAL.]

Sealed and delivered in presence of—

Approved by—

SAMUEL TREAT.

87 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, Joseph H. Clark, clerk of the district court of the United States in and for the eastern district of Missouri, do hereby certify the writings hereto annexed to be a true transcript of record and proceedings had in case No. 2668, 1876 of William Dudley, assignee of the estate, and effects of William P. Bush, bankrupt in bankruptcy, complainant, ag'st Joseph G. Easton, defendant, as fully as the same remains on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this first day of September, in the year of our Lord eighteen hundred and seventy-six.

[SEAL.] JOSEPH H. CLARK,
Clerk of said Court.

And afterwards, to wit, on October 3rd, 1876, at the regular September term of the circuit court of the United States for the eastern district of Missouri, the following further proceedings were had in said cause, to wit:

Decree.

88 WILLIAM DUDLEY, ASSIGNEE OF WILLIAM P. Bush, bankrupt, appellant, *ag'st* JOSEPH G. EASTON, APPELLEE. } 863.

This day come the said parties by their solicitors, the appellant by Messrs. Dryden and Dryden, and the appellee by Messrs. J. M. & C. H. Krum, and this cause coming on to be heard was submitted to the court upon the record as certified from the district court of the United for the eastern district of Missouri and the argument of counsel, on consideration whereof, and being fully advised in the premises, it is ordered, adjudged and decreed that the decree of the said district court in form aforesaid by the said district court rendered be and the same is hereby in all things affirmed.

It is further ordered that the said appellee have and recover against said appellant the costs in this behalf expended and have thereof execution.

MEM.—His honor Judge Treat took no part in the disposition of this case.

And afterwards, to wit, on the 11th day of November, A. D. 1876, the following further proceedings were had in said court, to wit:

89 *Appeal to U. S. Supreme Court granted.—Bond filed.*

WM. DUDLEY ASSIGNEE, &c., APPELLANT, *vs.* JOSEPH G. EASTON, APPELLEE. } 863.

This day comes the said appellant by his solicitors, and on motion it is ordered that an appeal be granted in this cause to the Supreme Court of the United States, and thereupon the said appellant files his bond for appeal, which is by the court approved and ordered to be filed.

Which said bond for appeal is in the words and figures following to wit:

Bond for appeal.

Know all men by these presents that we, William Dudley, assignee in bankruptcy of William P. Bush as principal, and Henry Root, John Nichols, and Richard Holtzlaw as sureties, are held and firmly bound unto Joseph G. Eaton, Amos J. Stillwell, Samuel Logan, William P. Bush and Emma Bush, his wife, in the full and just sum of five hundred dollars, to be paid to the said Joseph G. Eaton, Amos J. Stillwell, Samuel Logan, William P. Bush and Emma Bush, their respective heirs, executors, administrators or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents, sealed with
90 and dated this day of November, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas lately, at the September term, A. D. 1876, of the circuit court of the United States for the eastern district of Missouri, in a suit in equity depending in said court between William Dudley, assignee in bankruptcy of William P. Bush, plaintiff, and Joseph G. Easton, Amos J. Stillwell, Samuel Logan, William P. Bush and Emma Bush, defendants, decree was rendered against the said plaintiff, and said plaintiff has prayed an appeal from the said decree of said circuit court to the Supreme Court of the United States in order to reverse the judgment in the aforesaid suit, which appeal is taken to a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such, that if the said plaintiff shall prosecute his said appeal with effect and answer all damages and costs if he fail to make good his appeal, then the above obligation to be void, else to remain in full force and virtue.

HENRY ROOT. [SEAL.]
JOHN NICHOLS. [SEAL.]
RICHARD HOLTZLAW. [SEAL.]

Sealed in presence of—

WILLIAM DUDLEY, *Assignee.* [SEAL.]

91, 92 Approved by John F. Dillon & appeal allowed.

93 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify that the foregoing and above is a full, true, and complete transcript of the pleadings and proceedings had in case No. 863 of William Dudley, assignee of William P. Bush, bankrupt, appellant, against Joseph G. Easton, appellee, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court at office in the city of St. Louis in said district this 6th day of January, in the year of our Lord eighteen hundreed and seventy-seven.

[SEAL.]

M. M. PRICE,
Clerk of said Court.
By F. L. CRAWFORD, *Deputy.*

(Indorsement on cover:) No. 342. William Dudley, as assignee in bankruptcy of Wm. P. Bush, appellant, vs. Joseph G. Easton, Amos J. Stillwell, Samuel Logan, William B. Bush & Emma Bush. E. Missouri C. C. U. S. Filed 10th March, 1877.

REC. 342—3

FILED
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—IN THE—

Supreme Court of the United States,

OCTOBER TERM, 1880.

[No. 14.]

WILLIAM DUDLEY, Assignee of Wm. P. Bush, bankrupt, *Appellant*,

vs.

JOSEPH G. EASTON, AMOS J. STILLWELL, *et al*, *Respondents.*

Appeal from the Circuit Court for the Eastern District of Missouri.

STATEMENT AND BRIEF BY DRYDEN & DRYDEN, OF COUNSEL FOR APPELLANT.

STATEMENT.

This was a suit by bill in equity by the assignee in bankruptcy of one Wm. P. Bush, to enforce the specific performance of an agreement of composition made between Bush and the respondents, Easton and Stillwell, before bankruptcy, and to enjoin the enforcement of two judgments obtained by them, respectively, against him in the State court by fraud, and in violation of said agreement.

The suit was begun by the appellant in the District Court for the Eastern District of Missouri, on the 7th day

of June, 1875, by a bill then filed against respondent Easton alone. Demurrer having been sustained by that court to that bill, and to a first amended bill afterwards filed by leave, appellant on January 15, 1876, by leave, filed a second amended bill, in which the respondent, Stillwell, and the other respondents were added as parties defendant. [Printed Rec. p. 18.]

To this respondents Easton and Stillwell, on April 6, 1876, interposed a general demurrer, [Print. Rec. p. 29,] special demurrers previously interposed by them thereto having been overruled. [Rec. pp. 28 and 29.]

The district Court sustained this demurrer, and entered a decree dismissing the bill. [Rec. p. 30.] From that decree appellant took his appeal to the circuit court for said district, where the decree was affirmed. [Rec. p. 32.] From that decree of affirmance appellant has again apealed to this court. (Rec. p. 32.]

The allegations of the second amended bill were substantially as follows:

That in October, 1873, Bush, being embarrassed, called a meeting of his creditors, of whom Easton and Stillwell were two, and at such meeting, after announcing to those present his condition, desired that they should all extend the time of the maturity of their demands, and proposed, if they would do so, to make to each of them his four notes, due respectively in one, two, three, and four years, and bearing interest at 10 per cent. per annum, and secured by a deed of trust to be made by himself and wife to the respondent, Logan, upon all his real estate, including his homestead and his wife's dower, in satisfaction of their demands; that this proposition was agreed to and accepted by all there present, including Easton and Stillwell; that at this time Easton had pending in the Monroe Circuit Court a suit at law against Bush for the recovery of his demand, some $3,000 in amount, and Stillwell also a like suit in the same court for his demand, some $5,000

in amount; that in both suits Bush had been then already duly served with process, requiring him to appear and answer by a time then only a few days subsequent; that at this meeting the pendency of these suits was spoken of by Bush, and that Easton and Stillwell both then promised and assured him that they would not proceed further in their suits, but would accept the new notes proposed to be made, and would at once dismiss the suits.

The bill further alleges that, immediately after making this agreement with his creditors, Bush set about having prepared the notes and deed of trust required by its terms, and did in fact, in a reasonable time, cause such notes and deed to be made, signed the notes himself, and jointly with his wife signed, sealed and acknowledged a proper deed, conveying all his real estate to respondent Logan, as a trustee to secure the payment of all the notes *pro rata*, as agreed upon, and relinquishing to said Logan his wife's right of dower, and also within a reasonable time, namely, on December 5, 1873, delivered said deed to said Logan, and on divers days prior thereto delivered to all said creditors—said Easton and Stillwell only excepted—the notes promised them, which were by them severally accepted, in pursuance of their agreement. Also, that at all times after the agreement, Bush was ready and willing to deliver to respondents, Easton and Stillwell, their notes as agreed, and on the second day of January, 1874, made formal tender of the same to them, but the same were by them then and ever since refused. And the bill also avers that he would have made such tender sooner, but for the fact that before said notes and deed were prepared, they gave him to understand that they would not accept such notes, and that a tender of the same would be useless.

The bill further alleges that after the making of said agreement, relying upon the promises and assurance of

respondents that they would dismiss their suits, he made no answer thereto, and did not either in person or by attorney attend the term of the court to which the suits were brought, but that the respondents in violation of their agreement shortly thereafter proceeded with their suits, and before a reasonable time for making said notes and deed had expired, to-wit, about the 30th of October, took judgments therein against him,—Easton, for $3,200, and Stillwell for $5,041.60,—and upon said judgments caused executions to be issued and levied upon his property, real and personal; that Bush knew nothing of these proceedings by Easton and Stillwell until, by reason of the term lapsing, it was too late to apply by motion to set them aside, and that hence the same became binding and valid liens in law upon his property-

unassailable except in a court of equity.

The bill then avers that within four months after the making of said deed of trust to Logan, namely, on the 28th day of February, 1874, a petition was filed against Bush by certain creditors, upon which he in due time was adjudged a bankrupt, and that subsequently the appellant was duly chosen and qualified as his assignee; that Easton and Stillwell had proved no demands against the estate of Bush, but claimed the liens of their judgments, and execution levies to be valid and to give them an advantage over other creditors, and refused to relinquish the same and were threatening to enforce them.

The bill further contains allegations denying that the agreement named was made with any intent to give a preference to the creditors with whom it was made over other creditors, and averring that all the lands included in said deed of trust were then of the value of $50,000, while the debts to be secured by it, including those due said Easton and Stillwell, amounted to $40,394.70, further alleges that besides the property included

and intended to be included in the deed, Bush had other property sufficient in value to satisfy all his other creditors.

It was further averred in the bill that it was for the best interest of all the creditors of said bankrupt's estate—Easton & Stillwell only excepted—that said agreement and deed should be recognized and enforced by complainant as assignee, and that the bill had been in fact filed by him as such assignee at the request and by the direction of all of the creditors, as well as those not secured by said deed, as of those so secured, said Easton and Stillwell only excepted.

The bill further makes tender of the notes so signed by the bankrupt in December, 1873, and of full performance on the part of the assignee of said agreement of said Bush, and prays that respondents Easton and Stillwell be required also, specifically, to perform the same—to accept said notes and the benefit of said deed, and to execute a release of all claims under the judgments and executions, and that they may be forever enjoined from claiming any benefit of them, and for general relief.

POINTS AND AUTHORITIES.

The demurrer to the second amended bill ought to have been overruled. It stated facts sufficient to entitle appellant to relief in equity.

I.

Bush, before bankruptcy, could have compelled the specific performance of the agreement of composition made with him by Easton and Stillwell, and have enjoined the enforcement of the judgments taken in violation and fraud of that agreement. He was not restricted for relief to an action at law for damages. The damages recoverable, in such a case, "would not be an accurate

satisfaction" for the injury caused by breach of the agreement, and their "extent could not be exactly shown." Where the remedy at law for the breach of any contract is inadequate, incomplete, or uncertain, or where the damages recoverable "would not be an accurate satisfaction, or their extent cannot be exactly shown," equity will give relief by compelling a specific performance. This applies as well to contracts that do *not* relate to land as to those that do.

Express Co. v. R. R. Co., 99 U. S., p. 200 (top);
Story's Eq. Jur., § 728.

See, also, cases of—

Hibbard v. Eastman, 47 N. H., 510;
Wright v. Bell, 5 Price (Exch.), 331;
Adderley v. Dixon, 1 Sim. & Stu., 608;
Buxton v. Lister 3 Atk., 383;
Herman v. Rogers, L. R., 16 Eq., 18;
Phillips v. Berger, 8 Barb., 527;
Same v. Same, 2 *Id.*, 608;
Sullivan v. Tuck, 1 Md. Ch., 59;
Furman v. Clark, 11 N. J., Eq., 310;
Cutting v. Dana, 25 N. J. Eq., 265;
Clark v. Flint, 22 Pick, 238;
Dow v. Tuttle, 4 Mass., 415;
Weir v. Mundell, 3 Brews. (Pa.) 594.

The advantage of the agreement for extension of time of payment, and acceptance of notes distributing the debts over a period of four years, was, that by means of it Bush could retain his capital and credit and continue in business, with the chance during the given time of making enough profit out of his business, or by advantageous sales of his property, to pay off all he owed, and the interest agreed for, and save something for himself and family. Of the money value of this advantage, it is plainly impossible to make any exact estimate. And, it is extremely doubtful whether in a court

of law any damages would be recoverable for the loss of such an advantage. They would necessarily be largely speculative.

Hence, we submit that the case is one where, in the language of this court, in Express Co. v. R. R. Co., 99 U. S., p. 200, "the pursuit of the legal remedy would be attended with doubt and difficulty," and where, "under the circumstances, a judgment at law would not meet the demands of justice," and where, therefore, equity would have furnished a more complete remedy by specifically enforcing the contract at the suit of Bush. It will also afford the same relief at the suit of the appellant, as assignee of Bush, who, as such, has all of his rights in equity and choses in action.

U. S. Rev. Stats., §§ 5044 and 5046.

II.

The judgments obtained by Easton and Stillwell were obtained unfairly, in violation of their agreement, and in consequence of Bush being lulled to sleep by their assurances that they would not prosecute further. They cannot, therefore, in conscience be executed as against him or his estate in bankruptcy.

But for the promise to dismiss, Bush would have answered in the suits setting up the agreement to accept the new notes, and give an extension. That would have been a good defence in equity, if not in law. As a defence in equity it was pleadable in the suit at law, under the Missouri code.

2 Wag., Stats. Mo., p. 1016, §13;
Genl. Stats. Mo., 1865, p. 659, §13;
State *ex rel* Townshend *v.* Meagher, 44 Mo., 362.

Had it not been so pleadable at law then that fact of itself, would have been a good reason for the enjoining of the prosecution of the suits, or of the enforcement of the judgments obtained in them.

Being so pleadable, the fact that Bush was prevented from pleading it by the delusive conduct of Easton and Stillwell, was and is a further good reason for so enjoining their enforcement.

For it is well established by the decisions of this court, that any fact which clearly proves it to be against conscience to execute a judgment, and *of which the injured party could not have availed himself in a court of law*, or of which he could have availed himself at law, *but was prevented by fraud or accident*, will justify application to chancery for relief."

Marine Ins. Co. v. Hodgson, 7 Cranch, 332.
Freeman on Judg'ts, §§ 492 and 486;
2 Story's Eq. Jur., § 885.

And where parties litigant have failed to present claims or defences because of their reliance upon some agreement or understanding with the adversary, which, if observed, would have rendered such presentation unnecessary, courts of equity have *invariably* restored the injured parties to their rights under their agreement.

Freeman on Judgments, § 492;
Hibbard v. Eastman *et al.*, 47 N. H. 507;
Johnson v. Unversaw, 30 Ind. 435;
Jarmin v. Saunders, 64 N. C. 367;
Rogers v. Gwinn, 21 Iowa, 58;
Blakesly v. Johnson, 13 Wis. 533;
Holland and wife v. Trotter, 22 Gratt., 136.
Chambers vs. Robbins, 28 Conn. 552.
Pearce v. Olney, 20 Conn. 544.
Dobson v. Pearce, 12 N. Y. 165.

Thus, in Hibbard v. Eastman, *supra*, where a creditor, having sued the maker of a note, agreed with him to discharge him on receiving from him a certain note of another person within a time named, but still to hold the security of a mortgage previously given for the debt sued for; and where the note of the third party was de-

livered to the creditor, as agreed, but he still went on and obtained judgment against the debtor, and was proceeding to enforce it, on a bill by the debtor to restrain the enforcement of the judgment, it was held that the agreement of the creditor was in effect an agreement not to further prosecute his suit, and that it was manifestly against conscience to permit the creditor to use the advantage obtained by a judgment taken in violation of such an agreement, and that equity ought to interpose to prevent it.

And in the case of Blakesley v. Johnson, *supra*, where after suit begun before a justice, the parties met and agreed upon a settlement, by which the plaintiff in that suit received a watch in full of all demands, and agreed to discontinue the suit, but instead of doing so, went on the adjourned day, and took judgment without the knowledge of the defendant in the suit, who remained ignorant of it until the time for appealing had expired, and where said defendant then brought a bill to enjoin the execution of the judgment so obtained, the Supreme Court of Wisconsin sustained the bill, and enjoined the plaintiff therein from enforcing it. And in the same case, it appearing that the agreement to discontinue was made on Sunday, and void, the court held that that was immaterial, using the following language [p. 533]:

"Having obtained it" [the judgment] "by making an unjust use of an agreement for a settlement, even though void in law because made on Sunday, yet acted on by the other party, who was thereby prevented from appearing to defend himself, the judgment ought not to stand. It falls within the principle of that class of cases in which it is held that equity will relieve against an iniquitous judgment at law where the defendant was prevented from appearing and defending his rights by any trick or artifice of the other party. The fact that such artifice was made successful by a resort to an agreement

void in itself does not change the applicability of the principle. It is well known that courts of equity will even specifically enforce an agreement void at law when it has been so far acted on by one of the parties that it would operate as a fraud upon the other to allow either then to repudiate it. The fact that the agreement was void is no answer. Neither is it here. The reasoning upon which that doctrine of equity rests is entirely applicable to a case like this, though here the relief does not consist in specifically enforcing the void agreement, but only in setting aside the unjust judgment obtained by means of it."

So, also, in the case of Rogers v. Gwinn, *supra*, decided by the Supreme Court of Iowa in 1866 (Dillon, J., delivering the opinion of the court), the facts were thus: suit was brought on a foreign judgment obtained by plaintiff against defendant in the absence of defendant, and he not appearing to defend, because of plaintiff telling him he need not come back and defend, as he would dismiss the suit. The facts as to the obtaining of the judgment in this way were set up as a defence to the suit on the judgment in Iowa. It was held that they constituted a good defence in equity to the judgment, and under the Iowa Code could be set up as such in an action at law.

Said the court: "If the judgment sued on had been rendered be a court in Iowa, the facts found by the court below would by a good defence,—at least in equity,—to an action upon it, or sufficient to require a court of equity, upon petition filed for that purpose, to cancel it."

The allegations of the bill bring appellant's case precisely within the principles of the cases cited. Bush having been sued by two creditors (to whom together he owed some $8,000), out of a number, to whom he owed in the aggregate about $40,000, and knowing that unless some general arrangement was made the whole of his

property would be sacrificed upon executions in favor of those two alone, called all together, and after laying the whole matter before them, obtained from them an agreement that in consideration that he would agree to pay them the whole amount of their debts, in certain instalments, with interest until paid at ten per cent. per annum, and would secure the payment thereof by deed of trust on all his real estate, worth $50,000, they would give him time and accept his notes for such instalments so secured. Easton and Stillwell moved by the consideration, no doubt, that unless they agreed to the terms proposed, Bush would put all of his creditors upon an equality, either by going into bankruptcy or making a voluntary assignment, or confessing judgment in favor of each at the same term of court, all of which three things it was perfectly lawful for him to do, agreed to accept his offer, and having so done as incident thereto, assured him that they would dismiss their suits. Led by this assurance he gave no further attention to the defense of the suits, (as, but for it, he would have done,) and hence, without having set up as a defence, the agreement to extend, as he might have done, judgments were taken against him. The term having lapsed before he learned of the judgments, and therefore being thus cut off from an application to the court by motion to set them aside, Easton and Stillwell saw the advantage they had and declined to set them aside, or carry out the original agreement. Hence, although the rest of the $40,000 of creditors carried out their agreement and accepted the notes for the deferred payments, the whole advantage of the plan was lost, and Easton and Stillwell got an advantage which they could not otherwise have had. Hence, also, Bush being unable, with these judgments, to go on, was forced into bankruptcy, and his assignee takes his property, subject to the lien of judgments in favor of a part of the creditors, instead of free for all.

Applying the facts as alleged, we submit that it is

manifestly unjust that those two creditors should be allowed to retain the advantage gained by them by these unfair means over the other creditors, and that the decision of the circuit court, virtually to the contrary, is wrong.

III.

The agreement alleged, and sought to be enforced by the bill, was not invalid, as being in fraud of the provisions of the bankrupt law.

True, it is alleged to have been made with a part of B.'s creditors, not all of them. How many were not included does not appear. They may have been very few in number and small in value.

But whether many or few, it is positively averred in the bill that for such as were not included, Bush had *other property not included*, nor intended to be included in the deed of trust proposed to be made, *more than sufficient* in value to *satisfy them in full.* It is *further* averred that *there was no intent* on the part of Bush, at the time of the making of said agreement or deed, *to thereby give a preference* to those who were parties to it over his other creditors. No such intent can be inferred from the facts averred in the bill. Without such intent, how can it be claimed that the agreement was in contravention of either the letter or spirit of the act?

Such an intent, as also the knowledge of such intent on the part of the creditor, is an essential element of a fraudulent preference.

Tiffany v. Lucas, 15 Wall, 410.

As was said by the court in that case (p. 421): "*It is for the interest of the community that every one should continue in business, and avoid, if possible, going into bankruptcy.*" This interest the agreement proposed by Bush was intended to promote.

IV.

Moreover it does not lie in the mouth of the respondents to say that the agreement was in contravention of the bankrupt law.

The assignee, *because of the release of dower by Mrs. Bush, and waiver of homestead, and by the direction of all the creditors (secured and unsecured) except them only*, has seen fit to recognize and to confirm as valid the deed of trust which they agreed to take. [Record, p. 25.] No one else can attack it or urge any fault in it. It is as to them the same as if bankruptcy had not intervened. Could respondents have objected to the deed and their agreement to accept it, as being in fraud of the act, if no proceedings in bankruptcy had been begun, or if none had been begun until after four months? Clearly not. How, then, can they now object when, by the action of the assignee, the conveyance is made valid beyond all question, and as much so as if bankruptcy had not intervened?

Conveyances by way of preference are not absolutely void: they are only voidable at the suit of the assignee, or one claiming under him. They cannot be taken advantage of by parties not claiming under the bankruptcy proceedings.

Maltbie v. Hotchkiss, 5 Bankptcy Reg., 485;
Cragin v. Thompson, 2 Dill., 513;
Bean v. Brookmire, 1 *Id.*, 30;
Bump on Bankruptcy (8th ed.) pp. 829 and 822;
Penniman v. Cole, 8 Met., 496;
Atkins v. Spear, 8 Met., 490;
Seaman v. Stoughton, 3 Barb. Chy., 344.

The assignee may at his election affirm the validity of a conveyance which otherwise would be avoided as a preference. The parties to the contract cannot avoid it.

Butler v. Hildreth, 5 Met., 49,
Avery v. Hackley *et al.*, 11 Bank Reg., 243 and 244; S. C., 20 Wall, 114.

It would be a strange perversion of the provisions of the bankrupt law to allow Easton and Stillwell by insisting that the agreement proposed was violative of those provisions, to secure an advantage they were intended to prevent.

V.

The bill was properly brought originally in the District Court. That court under the bankruptcy law had jurisdiction.

U. S. Rev. Stats, § § 4972 and 4979;
Re Christy, 3 How., 292;
Mitchell v. Manfg. Co., 2 Story, 648;
Re Alexander, 3 B. R., 29;
Morgan v. Thornhill, 11 Wall., 77;
Smith v. Mason, 14 Id., 419;
Marshall v. Knox, 16 Id., 551.

JOHN D. S. DRYDEN,
JOHN W. DRYDEN,
Counsel for Appellant.

OFFICE SUPREME COURT U.S.
FILED
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JAMES H. McKENNEY, Clerk

IN THE

Supreme Court of the United States.

NO. 113.

WILLIAM DUDLEY, ASSIGNEE IN BANKRUPTCY OF WILLIAM P. BUSH, - - - *Appellant,*

Against

JOSEPH G. EASTON *et al.*, - - *Respondents.*

BRIEF AND ARGUMENT OF RESPONDENTS.

J. M. & C. H. KRUM.
For Respondents.

STATEMENT.

This case comes by appeal from a judgment on demurrer to the appellant's second amended bill.

The material averments of the second amended bill are as follows:

Page 18 Record. On October 10, 1873, the respondent, Joseph G. Easton, sued William P. Bush, on a note, in the sum of three thousand dollars, to the October term, 1873, of the Circuit Court of Monroe County, Missouri. The respondent, Page 19 Record. Amos J. Stillwell, also sued Bush, to the same term, on a note for five thousand dollars. Service of process was duly had in time for the October term. At the time when these suits were brought Bush was embarrassed and insolvent.

Page 19 Record. On October 24, 1873, being then insolvent, Bush met "*divers persons, creditors of him, said Bush, including said defendants, Easton and Stillwell, at a public inn in the city of Palmyra,*" Missouri, and announced to them his insolvent condition. He called attention to the suits of Easton and Stillwell; indicated that judgments obtained in those suits would give an advantage to the plaintiffs over other creditors; requested a dismissal of the suits, and an extension of the time for payment of the claims of the "*creditors there present,*" and "proposed to them that, if they would so extend the time of payment thereof, he would convey *all his real property* to such persons as they should select as trustees, to secure to them the *payment of their several demands equally,*

with interest on each from that time, at the rate of ten per centum per annum."

Page 20 Record. The creditors present, including Easton and Stillwell, agreed to extend the time of payment for one, two, three and four years, and Bush agreed to execute a deed of trust to secure the deferred payments. Easton and Stillwell agreed to dismiss their suits.

Pages 20 & 21 Record. Relying upon the agreement entered into at the meeting of the portion of his creditors indicated, Bush did not enter appearance at the return term of the Marion Circuit Court, and made no defense to the suits of Stillwell and Easton. He made the notes agreed upon, and executed the deed of trust intended to secure their payment. These notes Bush was ready to deliver to Easton and Stillwell as early as November 17, 1873, and they were formally tendered on January 2, 1874. Easton and Stillwell refused to accept them. They were accepted by the other creditors, who had been present at the meeting at Palmyra.

Pages 22 & 23 Record. Easton and Stillwell obtained final judgments at the October term of the Marion Circuit Court. These judgments were obtained without the knowledge of Bush. He had no notice of their rendition until after the term had lapsed, and hence he filed no motion to vacate the judgment.

Before the deed of trust had been executed by Bush, Stillwell and Easton caused executions to be issued and levies thereunder to be made on lands of Bush, situated in Monroe and Marion Counties.

Bush was adjudged bankrupt March 24, 1874.

Tender is made of the notes called for by the agreement entered into at Palmyra.

The second amended bill further avers:

Pages 24 & 25 Record. "And your orator further says that, at the time of the making of said agreement of extension and of said deed of trust said Bush had a large amount of property, not included or intended to be included in said deed, sufficient in value to satisfy all the debts owing by said Bush to his other creditors, who were not parties to said agreement; that said deed was not made, nor was said agreement entered into, by said Bush with any intent to give a preference thereby to the parties to said agreement, or any of them, over his other creditors, or with the intent thereby to convey his said property, or any of it, in fraud of the provisions of said act of Congress or the acts amendatory thereof, but solely under the belief on the part of said Bush that, by obtaining such extension of time of payment as aforesaid, he would be enabled to pay all his creditors their debts in full, together with interest at the rate of ten per centum per annum; that the entire indebtedness secured by said deed of trust, including that to said Stillwell and Easton, amounted to 40,394.70 dollars, and that all the lands mentioned in said deed were then thought to be worth, and in fact were worth, the sum of 50,000 dollars, especially if a reasonable time could be obtained to negotiate a sale of the same; that among the property described in said deed of trust was that occupied by said Bush and his family as a homestead, out of which he was entitled to have set apart to him, as exempt from levy and sale under execution a homestead of the value of 1,500 dollars under the laws of this State; that, because of the release of the dower interest of the defendant, Emma C. Bush, wife of said bankrupt, in all of his said lands described in said deed, and the waiver and conveyance of all his right to exemption of a homestead given and made by said deed, and for other good and sufficient reasons, it is to the interest of all of the creditors of said bankrupt's estate, save only said Easton and Stillwell, that the said deed of trust should be recognized, confirmed and enforced by your orator as assignee as aforesaid; and in fact this bill is filed by your orator at the request and by the direction and on the behalf of all the creditors of said Bush, whether secured or unsecured, excepting only said Easton and Stillwell."

The bill prays that Easton and Stillwell be required to perform their agreement; that they be compelled to accept the notes tendered them; that the judgments obtained against Bush be set aside, and for general relief.

BRIEF AND ARGUMENT.

The second amended bill does not state facts sufficient to entitle the appellant to equitable relief.

I.

The appellant sues in virtue of the reservation of rights to him as assignee, which is made by the bankrupt act.

a "All the property conveyed by the bankrupt in fraud of his creditors; ALL RIGHTS IN EQUITY, choses in action, patent rights and copy-rights, * * * shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, * * * be at once vested in such assignee."

Revised Statutes, Section 5046.

It is in virtue of this reservation, or grant of rights, that the appellant sues. Hence, unless the bankrupt, himself, could have proceeded in equity to enforce a specific performance of the Palmyra agreement, the appellant cannot now have a decree requiring such performance. He has such rights as the bankrupt has. He has no other rights. He stands precisely where the bankrupt stood. He can be heard to assert no other position.

b. The appellant does not represent the creditors of the bankrupt in this proceeding.

He does not seek to set aside the judgments on the ground that they were obtained in contravention of the bankrupt act. He does not seek to avoid the judgments by reason of any act done, or suffered to be done, by the bankrupt. He stands where the bankrupt would have stood, had there been no adjudication in bankruptcy.

c. Furthermore, the second amended bill expressly takes the judgments out of all the provisions of the bankrupt act which afford relief to assignees on the ground of fraud, preference or advantage to one creditor over other creditors.

1. The judgments were obtained against the wish of the bankrupt.

2. They were obtained without his knowledge or consent.

3. Even his non-resistance was unwitting.

In Wilson *vs.* City Bank, 84 U. S., 488, this Court determined:

"That something more than passive non-resistance of an insolvent debtor to regular judicial proceedings, in which a judgment and levy on his property are obtained, when the debt is due and he is without just defense to the action, is necessary to show a preference of a creditor, or a purpose to defeat or delay the operation of the bankrupt act.

"That the fact that the debtor, under such circumstances, does not file a petition in bankruptcy, is not sufficient evidence of such preference, or of intent to defeat the operation of the act.

"That, though the judgment creditor, in such case, may know the insolvent condition of the debtor, his levy and seizure are not void, under the circumstances, nor any violation of the bankrupt law.

"That a lien, thus obtained by him, will not be displaced by subsequent proceedings in bankruptcy against the debtor, though within four months of the filing of the petition."

II.

Bush, the bankrupt, could have had no remedy in equity against the respondents.

The theory of the appellant seems to be that Bush was lulled into repose by the agreement to dismiss the suits. Judgments were obtained which will give the

BRIEF AND ARGUMENT.

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I.

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> Revised Statutes, Section 5046.

It is in virtue of this reservation, or grant of rights, that the appellant sues. Hence, unless the bankrupt, himself, could have proceeded in equity to enforce a specific performance of the Palmyra agreement, the appellant cannot now have a decree requiring such performance. He has such rights as the bankrupt has. He has no other rights. He stands precisely where the bankrupt stood. He can be heard to assert no other position.

b. The appellant does not represent the creditors of the bankrupt in this proceeding.

He does not seek to set aside the judgments on the ground that they were obtained in contravention of the bankrupt act. He does not seek to avoid the judgments by reason of any act done, or suffered to be done, by the bankrupt. He stands where the bankrupt would have stood, had there been no adjudication in bankruptcy.

c. Furthermore, the second amended bill expressly takes the judgments out of all the provisions of the bankrupt act which afford relief to assignees on the ground of fraud, preference or advantage to one creditor over other creditors.

1. The judgments were obtained against the wish of the bankrupt.

2. They were obtained without his knowledge or consent.

3. Even his non-resistance was unwitting.

In Wilson *vs.* City Bank, 84 U. S., 488, this Court determined:

"That something more than passive non-resistance of an insolvent debtor to regular judicial proceedings, in which a judgment and levy on his property are obtained, when the debt is due and he is without just defense to the action, is necessary to show a preference of a creditor, or a purpose to defeat or delay the operation of the bankrupt act.

"That the fact that the debtor, under such circumstances, does not file a petition in bankruptcy, is not sufficient evidence of such preference, or of intent to defeat the operation of the act.

"That, though the judgment creditor, in such case, may know the insolvent condition of the debtor, his levy and seizure are not void, under the circumstances, nor any violation of the bankrupt law.

"That a lien, thus obtained by him, will not be displaced by subsequent proceedings in bankruptcy against the debtor, though within four months of the filing of the petition."

II.

Bush, the bankrupt, could have had no remedy in equity against the respondents.

The theory of the appellant seems to be that Bush was lulled into repose by the agreement to dismiss the suits. Judgments were obtained which will give the

respondents an advantage over other creditors of the defendants in those suits.

To this the respondents reply:

1. That they have obtained a lien which may operate to the exclusion of creditors other than themselves, is not a matter of which their debtor can complain. That they have obtained such advantage by deception practiced upon the debtor, is not a matter of which such debtor can complain. He was insolvent. His property was subject to his debts. In the race between creditors the debtor cannot be heard to say, as to one creditor who obtained the advantage of a lien, that had he known such to be the purpose of the creditor, he would have voluntarily gone into bankruptcy, and thereby rendered such advantage impossible to be had. It is Bush's rights in equity which the appellant now seeks to enforce. The respondents cannot be held responsible to Bush's assignee for a wrong done to some person other than Bush.

2. But even the creditors who were present at the Palmyra meeting could not have relief. The second amended bill avers:

a. October 24, 1873, meeting at Palmyra—portion of Bush's creditors present—agreement to accept new notes in lieu of those already held by creditors. The new notes to be secured by mortgage.

b. October 31, 1873, judgments obtained by respondents by default.

c. November 3, 1873, term closed and judgments became final.

d. That, at sundry times prior to December 5, 1873, Bush made and delivered to each of his creditors present at the meeting (except the respondents) the notes called for by the agreement, and that *such notes were duly accepted by the creditors in full payment and satisfaction of their respective demands.*

e. There is no averment that the creditors other than the respondents were not aware that the judgments had been rendered, or that they accepted the notes in ignorance of the refusal of the respondents to carry out the Palmyra agreement.

In view of these facts, what remedy in equity could be invoked in behalf of creditors other than the respondents? All of the creditors who were present at the Palmyra meeting are alleged to have accepted the new notes in full satisfaction of their original demands. It is not averred that the creditors who were present at the meeting were not aware of the defaults and judgments which were taken by the respondents. Hence their debts have been satisfied. They knew also that the agreement would not be kept by the respondents. They knew that the judgments had been obtained. If they could have been heard at all in the Monroe Circuit Court, they certainly suffered the term to lapse without action on their own part. There can be no room for argument, that if they had any rights they have been absolutely concluded through their own indifference and neglect.

3. The second amended bill contains no averment showing that Bush had a defense to the actions of the respondents, which he might have interposed had he

not been misled by the agreement entered into by the respondents.

"The rule allowing parties to appeal to chancery against a judgment in any Court is of great strictness and inflexibility; and it is necessary that it should be so, as otherwise the jurisdiction of that Court would supplant all other tribunals. A Court of Equity, therefore, will not lend its aid, unless the party claiming its assistance can impeach the judgment by facts, or on grounds of which he could have availed himself at law, or was prevented from doing it by fraud or accident, or the act of the opposite party unmixed with negligence or fault on his own part."

Watts *vs.* Gayle, 20 Ala., 817.

This is the general rule observed by all Courts of Equity.

Marine Ins. Co. *vs.* Hodgson, 11 U. S., 336.

This salutary rule operates with the utmost stringency against the appellant, who represents Bush for the purpose of this suit, and who can be heard in equity only where Bush could have been heard. For there is no pretense that Bush had a defense to the suits brought by the respondents. He owed the debts. The notes evidenced *bona fide* loans. There was no defense to be set up against them, unless the agreement entered into at Palmyra can be said to be a defense. But what was the agreement? It was made by a part of Bush's creditors. It was an agreement by a part of the creditors to accept new notes in lieu of those which they already held—thereby extending payment of Bush's indebtedness through a term of years. It was merely an executory agreement to extend the time of the payment of debts which had already become due and payable. Such an agreement has never been held to be a defense against an action brought on the original indebtedness. Even an

agreement not to sue before a time specified, has always been held to constitute no defense to a suit on the demand whose enforcement the creditor stipulated to postpone.

Bridge *vs.* Tieman, 36 Mo., 439.

III.

The appellant asks interference by a Court of Equity:

1. To ratify and approve an agreement which, by his own showing, would have worked a fraud upon the bankrupt act and defeated its operation.

2. To afford relief to him as the representative of a party to such fraud.

This application is made on the theory that the agreement entered into at Palmyra would have been beneficial to the creditors of Bush. By means of it they would have been enabled to obtain the security of Bush's lands freed from the inchoate rights of dower in the wife of Bush.

The interests of the creditors would have been advanced by the fact that Bush would have included his homestead among the lands conveyed to secure his debts. But the difficulties in the way of such a theory are obvious. The appellant cannot enforce creditors' rights, or advance their prospects in this proceeding. He sues in virtue of a reservation to him, not of rights possessed by creditors of the bankrupt, but of rights possessed by the bankrupt, and by him alone. This, of itself, is a complete answer to the proposition that creditors are represented for the purposes of this proceeding. They had no rights, as has been determined by the Supreme Court of Missouri, in a proceeding instituted in the State

not been misled by the agreement entered into by the respondents.

"The rule allowing parties to appeal to chancery against a judgment in any Court is of great strictness and inflexibility; and it is necessary that it should be so, as otherwise the jurisdiction of that Court would supplant all other tribunals. A Court of Equity, therefore, will not lend its aid, unless the party claiming its assistance can impeach the judgment by facts, or on grounds of which he could have availed himself at law, or was prevented from doing it by fraud or accident, or the act of the opposite party unmixed with negligence or fault on his own part."

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This salutary rule operates with the utmost stringency against the appellant, who represents Bush for the purpose of this suit, and who can be heard in equity only where Bush could have been heard. For there is no pretense that Bush had a defense to the suits brought by the respondents. He owed the debts. The notes evidenced *bona fide* loans. There was no defense to be set up against them, unless the agreement entered into at Palmyra can be said to be a defense. But what was the agreement? It was made by a part of Bush's creditors. It was an agreement by a part of the creditors to accept new notes in lieu of those which they already held—thereby extending payment of Bush's indebtedness through a term of years. It was merely an executory agreement to extend the time of the payment of debts which had already become due and payable. Such an agreement has never been held to be a defense against an action brought on the original indebtedness. Even an

agreement not to sue before a time specified, has always been held to constitute no defense to a suit on the demand whose enforcement the creditor stipulated to postpone.

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III.

The appellant asks interference by a Court of Equity:

1. To ratify and approve an agreement which, by his own showing, would have worked a fraud upon the bankrupt act and defeated its operation.

2. To afford relief to him as the representative of a party to such fraud.

This application is made on the theory that the agreement entered into at Palmyra would have been beneficial to the creditors of Bush. By means of it they would have been enabled to obtain the security of Bush's lands freed from the inchoate rights of dower in the wife of Bush.

The interests of the creditors would have been advanced by the fact that Bush would have included his homestead among the lands conveyed to secure his debts. But the difficulties in the way of such a theory are obvious. The appellant cannot enforce creditors' rights, or advance their prospects in this proceeding. He sues in virtue of a reservation to him, not of rights possessed by creditors of the bankrupt, but of rights possessed by the bankrupt, and by him alone. This, of itself, is a complete answer to the proposition that creditors are represented for the purposes of this proceeding. They had no rights, as has been determined by the Supreme Court of Missouri, in a proceeding instituted in the State

Court by some of those who were present at the Palmyra meeting. In this connection, we beg to refer to the opinion of that Court, which is set out in full in conclusion of this argument.

Furthermore, a complete answer to the theory of the second amended bill is also found in the fact, that the agreement made at Palmyra was a fraud upon the bankrupt act. Bush was insolvent. The agreement was for the benefit of only a part of his creditors. They were to be secured, so that what was due to them would be paid in full. It is alleged that Bush did not intend to give a preference; that he did not intend to work a fraud on the bankrupt act. But the act proposed would have been a preference. The agreement executed would have been a fraud on the act and defeated its operation. The appellant cannot be heard to say that Bush did not contemplate the natural result of his own deliberate acts. The agreement provided a method of administering upon the estate of Bush which was at variance from, and in defiance of, the bankrupt act. If a general assignment for the benefit of creditors, free from fraud, is, within the meaning of the bankrupt law, an act of bankruptcy; if the effect of such an assignment is to take and withhold the property of the debtor from the bankrupt law and to defeat its operation, and if the debtor must, on familiar principles of law, be held to have intended that effect, then, *a fortiori*, was the Palmyra agreement a violation of, and a fraud upon, the bankrupt act. Nothing further can add to the absurdity of the appellant's position, except the grave prayer to a Court of Equity, which derives its jurisdiction under the bankrupt law, that a decree of specific performance may be entered,

in defiance of and against the whole policy of the law, from which alone the Court obtains its powers and jurisdiction.

With all of the facts before the Court, under a bill seeking to enforce the Palmyra agreement, the Supreme Court of Missouri have disposed of the appellant's theory of equitable rights, as resulting from an executory agreement between a portion of the creditors of Bush, and as resulting, also, from a contemplated fraud on the bankrupt law. The Court say:

SUPREME COURT OF MISSOURI.

APRIL TERM, 1881.

JOHN LOUTHAN, Administrator of the estate of WALKER LOUTHAN *et al.*, - - - - - - - - *Respondents,*

vs.

AMOS STILLWELL, *et al.*, - - - - *Appellants.*

(Reporter will make a statement of the case.)

OPINION OF THE COURT.

The testimony, both with regard to the consummation of the agreement and its terms, is conflicting. John Nichols, one of the creditors who attended the meeting of creditors at which, it is alleged the agreement was entered into, testified that Louthan's proposition was, to give Bush one, two, three and four years, on his executing a deed of trust, to secure his indebtedness, on all his property, and that Bush proposed to get his wife's relinquishment of dower in his lands.

Other witnesses mention only the land, but do not say that other property was not also to be embraced in the deed of trust; but, without detailing the evidence, it is sufficient to say, that it is impossible, from the testimony to ascertain what precise property was to be conveyed. The meeting of creditors was on the 24th day of October, and the next day Stillwell wrote to Louthan, who was selected by the creditors to effect the proposed arrangement between them and Bush, stating the amount of his debt against Bush, and in that letter said: "Let me repeat, the consent of all the creditors (save and except Mr. Smith, the judgment creditor, whom Mr. Bush must satisfy) is vital to the success of the undertaking;" and again:

"The property should be free, with dower released, and all included in deed of trust."

This letter contains, in substance, the agreement as understood by several of plaintiff's witnesses, and as testified to by Stillwell himself. If not, it fully notified Louthan and the other creditors that it was Stillwell's understanding of the proposed arrangement, and was given the day after the creditors' meeting, and they had still time to abandon the scheme, and make such other terms with Bush as they and he might deem proper.

If all the creditors were to be made beneficiaries in the deed of trust, then, of course, Stillwell cannot be compelled to accept and complete an agreement by which only a portion of them was provided for. Or if all the property of Bush, real and personal was to be included in the deed of trust, and personal property of the value of $5,000 or $6,000 was omitted, he was not bound to waive the advantage he had secured by his suit against Bush, and accept the provision made for him in the deed of trust.

That the alleged agreement was violated on the part of Bush, is shown by Louthan's letter to Stillwell and Easton, of date November 25, 1873, in which he says:

"Mr. Nichols called on you yesterday with this proposition: that Mrs. Bush, with her husband, would sign the deed of trust, as agreed upon by *all his creditors*, by *them* paying her $2,000, at the termination of four years, if the property had to be sold, each signing an agreement to pay, *pro rata*, according to the amount of claim, which, I am satisfied, is the best that can be done. *If this meets your approbation*, meet here next Monday."

I have italicised those portions of the foregoing extracts which bear particularly upon the questions under consideration.

If the proposition made by Mrs. Bush, mentioned in this letter, was already embraced in the agreement made on the 24th of October, it had already, on plaintiff's theory, met Stillwell's approbation; but not only this letter, but all the evidence, shows that it was no part of the alleged agreement that Mrs. Bush was to be paid by the creditors $2,000 for her dower. This letter further shows that it was Louthan's understanding of the agreement that all the creditors were to become parties to it. If the contract be not actually concluded and certain in all its parts, as if the matter still rests to any extent in treaty, or be uncertain or undefined in any particular, a Court of Equity will not interfere by way of specific performance."

Story's Eq., 1 vol., sec. 736, C.

And if the party seeking a specific performance has disregarded the reciprocal obligations on his part, equity will not interfere, at his instance.

Id.

But that no agreement was concluded by the creditors and Bush, at their meeting on the 24th of October, and that Root, who testified that there was, and Nichols and Louthan did not so understand it, is shown by the fact that, in November, after the agreement is alleged to have been made, Root sued Bush by attachment in the Marion Circuit Court on the acceptances, which, by the alleged agreement, were to be delivered up to Bush, and Bush's notes at one, two, three and four years to be executed to him in their stead, and in the attachment bond executed in that case.

Louthan and Nichols were among Root's securities. It follows that a specific performance cannot be enforced against Stillwell; because the terms of the agreement are not clearly established, even if the evidence were sufficient to show that Stillwell and the other creditors, at their meeting, made and concluded any contract.

It cannot be ascertained, from the evidence, what property was to be conveyed by Bush, nor is it any more satisfactory with regard to the creditors who were to be beneficiaries in the deed. But a still more satisfactory reason is, that it fails to show that any final agreement was ever made between Bush and his creditors, or any of them, to which Stillwell was a party.

If, however, it was clearly established, that the agreement, as alleged, was made, and that Stillwell was a party to it, there is an insurmountable obstacle in the way to the relief sought by plaintiff.

By the alleged agreement, the parties stipulated for the performance of an act by Bush and themselves, violative of the bankrupt law. He was in fact, as the evidence shows, on the 28th of March, 1874, for the very act of executing the deed of trust in question, adjudged a bankrupt by the District Court of the United States, for the Eastern District of Missouri, on the petition of Jas. R. Dudley and John S. Bush, two of his creditors not parties to the said deed of trust. Appellant's counsel contends that the State Courts have no jurisdiction to enforce this Act of Congress.

The State Courts cannot administer the bankrupt law, or enforce its penalties.

The enforcement and administration of that law has been confided to the Federal Courts, but it is an Act of the Congress of the United States, made "in pursuance of the Constitution of the United States," and "is the supreme law of the land," "and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary, notwithstanding."

The defendant is not asking the Court to administer the bankrupt law, or to enforce its penalties, but the plaintiffs are demanding a decree, compelling him to violate the provisions of that act by executing an agreement which it inhibits.

When a contract is made and executed in violation of law, equity will give no aid to any party to the agreement, but leave them where, by their own misconduct, they have placed themselves; nor, if executory, will it compel a specific performance, for with no propriety could a Court, organized to administer the law, give its aid to one seeking the enforcement of a contract condemned by the law.

Claflin vs. Torlina, 56 Mo., 369.
Austin vs. Markham 44 Ga., 161.
Blasdale vs. Foule, 102 Mass., 447.

The judgment is reversed and the bill dismissed. All concur—NORTON, Judge—in the result.

JOHN W. HENRY.

Respectfully submitted.

J. M. & C. H. KRUM,

For Respondents.

14-106

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~323.~~ 77

HENRY H. KOON AND AMOS C. BABCOCK, PLAINTIFFS IN ERROR,

vs.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 30, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 323.

HENRY H. KOON AND AMOS C. BABCOCK, PLAINTIFFS IN ERROR,

vs.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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titled cause, directed to the marshal of the northern district of Illinois, in a plea of debt, returnable at the October term, A. D. 1875.

UPTON, BOUTELL AND WATERMAN,
Att'ys for Pl'ff.

To WM. H. BRADLEY, Esq., *Clerk.*

CHICAGO, *Sept.* 1*st*, 1875.

(Endorsed :) Filed Sept. 1, '75. Wm. H. Bradley, cl'k.

And on the same day, to wit, the first day of September, A. D. 1875, a writ of summons issued out of said clerk's office against said defendant in said entitled cause, which said writ, together with the return of the marshal annexed thereto, is in the words and figures following, to wit:

4 *Writ of summons.*

Circuit court of the United States of America, northern district of Illinois, ss :

To the marshal of the northern district of Illinois, greeting:

We command you to summon Henry H. Koon, Milton J. Butts, John J. S. Wilson, and Amos C. Babcock, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto the Phœnix Mutual Life Insurance Company, in a plea of debt ten thousand dollars, to its damage, as it is alleged, of ten thousand dollars, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 1st day of September, in the year of our Lord one thousand eight hundred and seventy-five, and of our Independence the 100th year.

5 [SEAL.] WM. H. BRADLEY, *Clerk.*

Special deputy's return.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss :

Know all men by these presents that I have appointed, and by these presents do appoint, D. G. Bean my true and lawful deputy to execute the annexed writ, The Phœnix Mutual Life Ins. Co. vs. Henry H. Koon et al., and to make return of the execution thereof according law.

B. H. CAMPBELL, [SEAL.]
United States Marshal for the Northern District of Illinois.

I have served the annexed writ in the following manner, to wit, by reading the same to and in the presence and the hearing of Milton D. Butts on the 18 day of Sept., A. D. 1875.

B. H. CAMPBELL,
United States Marshal,
By D. G. BEAN,
Special Deputy.

D. G. Bean, being duly sworn, deposes and says that he served the annexed writ as stated in the foregoing return, and that the expense returned by him, in addition to the fees, was actually incurred, and that

the same is according to law. Sworn to before me this eight-
6 eenth day of Sept., A. D. 1875.

[SEAL.] NARCISSE RIVARD,
Notary Public.

(Endorsed:) Filed Oct. 2nd, A. D. 1875. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 22d day of September, A. D. 1875, said plaintiff, by his attorneys, filed in said clerk's office his declaration in said entitled cause, which said declaration is in the words and figures following, to wit:

Declaration.

United States circuit court, northern district of Illinois. To the Oct. term, 1875.

PHŒNIX MUTUAL LIFE INSURANCE COMPANY
vs.
HENRY H. KOON, MILTON D. BUTTS, JOHN J. S. WILSON, AMOS C. BABCOCK.

The Phœnix Mutual Life Insurance Company, citizens of the State of Connecticut, incorporated by the name aforesaid by the said State, and having their principal place of business therein, plaintiffs in this suit, by Upton, Boutell and Waterman, their attorneys, complain of
7 Henry H. Koon, Milton D. Butts, John J. S. Wilson, Amos C. Babcock, who are citizens of the State of Illinois, defendants, of a plea that the said defendants render to the said plaintiffs the sum of ten thousand dollars, which the said defendants owe to and unjustly detain from said plaintiff.

For that whereas the said defendants heretofore, to wit, on the eleventh day o September, in the year A. D. 1868, at the city of Chicago, county of Cook, and State of Illinois, and in said northern district of Illinois, by their certain writing obligatory, bearing date the day and year last aforesaid, sealed with their seals, and now shown to the court, the said defendants became held and firmly bound unto the said plaintiffs in sum of ten thousand dollars, to be paid to the said plaintiffs, their successors and assigns; for the payment thereof the said defendants bound themselves, their heirs, executors, and administrators, jointly and severally, firmly by these presents.

And the said plaintiffs say that the said writing obligatory was and is subject to a certain condition thereunder written, whereby, after reciting that the said Henry H. Koon had been appointed by said company as their agent in Illinois for the purpose of procuring applications
8 for life-insurance and collecting premiums thereon, it is provided that if the said Henry H. Koon should pay or hand over all moneys belonging to said company which should at any time be received by him, including all moneys so received prior to the date of said writing obligatory, if any such there were, as well as that received thereafter, as also all moneys which he then owed or thereafter might owe said company on or before the 1st day of each month, and should faithfully discharge the duties as agent of said company, then said writing obligatory should be void; otherwise it should remain in full force and virtue.

Nevertheless the plaintiffs say that the said Henry H. Koon has not paid or handed over all monies belonging to said company which have

been received by him, and has not paid or handed over all monies which at or since the date of said writing obligatory were or have been owing from him to said company on or before the first day of each month, and has not faithfully discharged his duties as agent of said company.

But, on the contrary thereof, the said Henry H. Koon has from time to time since the date of said writing obligatory received large
9 sums of money belonging to said company, which he has failed to pay over to said company, as by the terms of said writing obligatory he was bound to do; and heretofore, to wit, on the 1st day of July, A. D. 1875, to wit, at Chicago aforesaid, the said Henry H. Koon had in his hands and possession a large sum of money, to wit, the sum of ten thousand dollars, belonging to said company, which as the agent of said company he had theretofore received, and which was then and there due and owing from him as said agent to said company, and which it was his duty then and there to pay over to said company, and which he then and there wrongfully and unlawfully converted to his own use.

By means of which said several premises the said writing obligatory became forfeited, and the said plaintiffs have sustained damages to a large amount, to wit, to the amount of ten thousand dollars, and thereby an action has accrued to the said plaintiffs to demand and have of and from said defendant the said sum of ten thousand dollars above demanded. Yet the said defendants, though often requested so to do, have not yet paid the said sum of ten thousand dollars above demanded, nor any part thereof, to the said plaintiffs, but to do this have
10 hitherto wholly neglected and refused, and still do neglect and refuse, to the damage of said plaintiff to the sum of ten thousand dollars. Wherefore they bring their suit, &c.

By their att'ys,

UPTON, BOUTELL AND WATERMAN.

Copy of bond.

Know all men by these presents, that we, I, Henry H. Koon, of the town of Kankakee, in the county of Kankakee, State of Illinois, as principal, and Milton D. Butts, of Kankakee, Ill.; John J. S. Wilson, of Quincy, Illinois, and Amos C. Babcock, of Canton, Ill., as sureties, are held and firmly bound unto The Phœnix Mutual Life Insurance Company, a company incorporated by general assembly of the State of Connecticut, and having an office and place of business in Hartford, State of Connecticut, in the penal sum of ten thousand dollars, lawful money of the United States of America, to be paid to the said company, its successors or assigns, to which payment, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this 11th day of September, one thousand eight hundred and sixty-eight.

11 The conditition of this obligation is such that whereas the above bounden Henry H. Koon has been appointed by said company as their agent in Illinois, for the purpose of procuring applications for life insurance and collecting premiums thereon: Now, if the said Henry H. Koon shall pay or hand over all moneys belonging to said company which shall at any time be received by him, including all moneys so received prior to the date of this instrument (if any such there be), as well as that received thereafter), as, also, all moneys which he now owes or hereafter may owe said company, on or before the first day of each month, and shall faithfully discharge the duties as

agent of said company, then this obligation shall be void; otherwise to remain in full force and effect.

HENRY H. KOON. [SEAL.]
MILTON D. BUTTS. [SEAL.]
JOHN J. S. WILSON. [SEAL.]
AMOS C. BABCOCK. [SEAL.]

Sealed and delivered in presence of—
C. C. HARRINGTON.
C. H. SEAVER.
JAMES P. ROOT.
[Int. rev. stamp cancelled.]

12 (Endorsed:) Filed Sept. 22d, 1875. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 5th day of October, A. D. 1875, said defendant, John J. S. Wilson, by his attorneys, filed in said clerk's office his plea in said entitled cause, which said plea is in the words and figures following, to wit:

Plea of John J. S. Wilson.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States, October term, A. D. 1875.

PHŒNIX MUTUAL LIFE INSURANCE COMPANY
vs.
HENRY H. KOON, MILTON D. BUTTS, AMOS C. Babcock, and John J. S. Wilson. } Debt.

And the said John J. S. Wilson, defendant, impleaded, etc., by Williams and Thompson, his attorneys, comes and defends the wrong and injury, when, etc., and says that he does not owe the said sum of money above demanded, or any part thereof, in manner and form as the plaintiff hath above thereof complained against him, and of this
13 he puts himself upon the country, etc.

By WILLIAMS AND THOMPSON,
His Attorneys.

(Endorsed:) Filed Oct. 5, 1875. Wm. H. Bradley, cl'k.

And on the same day, to wit, the 5th day of October, A. D. 1875, said defendant, Milton I. Butts, by his attorneys, filed in said clerk's office his plea in said entitled cause, which said plea is in the words and figures, to wit:

Plea of Milton I. Butts.

In the circuit court of the United States for the northern district of Illinois. Of the October term, A. D. 1875.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

HENRY H. KOON, MILTON I. BUTTS, JOHN J. S. Wilson, and Amos C. Babcock
ads.
THE PHŒNIX LIFE INSURANCE COMPANY. } Debt.

And now the said defendant, Milton I. Butts, impleaded with Henry

H. Koon, John J. S. Wilson, and Amos C. Babcock, by Barker and Seman, his attorneys, comes and defends the wrong and injury
14 when, etc., and says that he does not owe the said sum of money above demanded, or any part thereof, in manner and form as the plaintiff has above complained against him, and of this the said defendant puts himself upon the country, etc.

BARKER AND SEMAN,
Att'ys for Def't Butts.

(Endorsed:) Filed Oct. 5, 1875. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 20th day of November, A. D. 1875, an alias writ of summons issued out of said clerk's office against said defendants in said entitled cause, which said writ was on the 20th day of December, A. D. 1875, returned by the marshal of said district, to whom it was directed, without service.

Afterwards, to wit, on the 22d day of November, A. D. 1875, in the adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE PHŒNIX MUTUAL LIFE INSURANCE COMpany
vs.
HENRY H. KOON ET AL. } Debt.

15 On motion of the plaintiff, by its attorney, it is ordered that this cause be continued.

Afterwards, to wit, on the 13th day of April, A. D. 1876, a pluries writ of summons issued out of said clerk's office against said defendant in said entitled cause. which said writ, together with the return of the marshal annexed thereto, is in the words and figures following, to wit:

Pluries writ of summons.

Circuit court of the United States of America, northern district of Illinois, ss:

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you again to summon Henry H. Koon and Amos C. Babcock, impleaded with Milton J. Butts and John J. S. Wilson, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of May next, to answer unto The Phœnix Mutual Life Insurance Company in a plea of debt of ten thousand dollars, to its damage, as it alleges, of ten thousand dollars, and have you then and there this writ.

16 Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 13th day of April, in the year of our Lord one thousand eight hundred and seventy-six, and of our Independence the 100th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Special deputy's return.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Know all men by these presents, that I have appointed, and by these presents do appoint, Warren S. Noble my true and lawful deputy to execute the annexed writ, Phœnix Mutual Life Insurance Co. vs. Henry H. Koon et al., and to make return of the execution thereof according to law.

B. H. CAMPBELL, [SEAL.]
United States Marshal for the Northern District of Illinois.

I have served the annexed writ in the following manner, to wit, by reading the same to, and in the presence and the hearing of, Henry H. Koon, therein named, on the 17th day of April, A. D. 1876. I did not serve Amos C. Babcock, Milton J. Butts, and John J. S. Wilson, the other defendants therein named, being unable to find them within my district.

17

B. H. CAMPBELL,
United States Marshal,
By WARREN S. NOBLE,
Special Deputy.

Warren S. Noble, being duly sworn, deposes and says that he served the annexed writ as stated in the foregoing return, and that the expense returned by him in addition to the fees was actually incurred and that the same is according to law. Sworn to before me this seventeenth day of April, A. D. 1876.

[SEAL.]

JAMES L. YOUNG,
Notary Public. Attest the seal notarial.

(Endorsed:) Filed June 19th, A. D. 1876. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 19th day of July, A. D. 1876, a second pluries writ of summons issued out of said clerk's office in said entitled cause, which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Second pluries writ of summons.

Circuit court of the United States of America, northern district of Illinois, ss:

The United States of America, to the marshal of the northern district of Illinois, greeting:

We command you again to summon Amos C. Babcock, im-
18 pleaded with Milton J. Butts and John J. S. Wilson and Henry H. Koon, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto The Phœnix Mutual Life Insurance Company in a plea of debt of ten thousand dollars, to its damage, as it alleges, of ten thousand dollars, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 19th

day of July, in the year of our Lord one thousand eight hundred and seventy-six, and of our Independence the 101st year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

I have served the within writ by reading the same to and within the presence and hearing of Amos. C. Babcock, therein named, on the 19th day of July, 1876.

B. H. CAMPBELL,
U. S. Marshal,
By I. N. BUCK, *Deputy.*

19 (Endorsed:) Filed July 19th, A. D. 1876. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 24th day of October, A. D. 1876, a stipulation was filed in said clerk's office, in said entitled cause, in the words and figures following, to wit:

Stipulation.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

U. S. cir. court.

PHŒNIX MUTUAL LIFE INS. CO. *vs.* KOON ET AL. } Debt.

It is stipulated that defendants may now file plea of general issue and may hereafter file proper special pleas at any time up to two weeks prior to the time the cause is set for trial, notice to be given plaintiff's attorneys of the filing of such special pleas when filed, and that in taking testimony at Hartford or elsewhere any testimony may be taken which shall be admissible under any pleas hereafter filed and allowance by the court.

UPTON, BOUTELL AND WATERMAN,
Plaintiff's Attorneys.
JOHN C. BARKER,
Att'y for H. H. Koon, Milton J. Butts, and A. C. Babcock.

CHICAGO, *Oct. 23d*, 1876.

20 (Endorsed:) Filed Oct. 24, 1876. Wm. H. Bradley, cl'k.

And on the same day, to wit, the 24th day of October, A. D. 1875, said defendants, Henry H. Koon and Amos C. Babcock, by their attorneys, filed in said clerk's office their plea in said entitled cause, which said plea is in the words and figures following, to wit:

Plea of Henry H. Koon and Amos C. Babcock.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss :

October term, A. D. 1876, in circuit court thereof.

PHŒNIX MUTUAL LIFE INSURANCE COMPANY
vs.
HENRY H. KOON, MILTON I. BUTTS, JOHN J. S. Wilson, and Amos C. Babcock.

In action of debt on bond.

And the said Henry H. Koon and Amos C. Babcock, defendants, impleaded with Milton J. Butts and John J. S. Wilson, by R. G. Ingersoll and John C. Barker, their attorneys, come and defend the wrong and injury, when, &c., and say that they do not owe the said sum of money above demanded, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against them, and of this
21 the said defendants put themselves upon the country, &c.

R. G. INGERSOLL,
JOHN C. BARKER,
Said Defendants' Attorneys.

(Endorsed:) Filed Oct. 24, 1876. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 19th day of May, A. D. 1877, in the adjourned May term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE PHŒNIX MUTUAL LIFE INSURANCE COMpany
vs.
HENRY H. KOON, MILTON J. BUTTS, AND AMOS C. Babcock, impleaded with John J. S. Wilson. } Debt.

Now come the parties by their attorneys, and upon issue joined thereupon come a jury of good and lawful men, to wit: Aaron L. Brown, Thomas H. Beebe, E. B. Baker, Joseph Stephenson, Perry Walker, Harrison Downing, Lucius J. Cobb, Thomas Carr, Lyman D. McDaid, B. L. Flagg, J. G. Demorest, and Nathaniel Moore, who were all duly elected, tried, and sworn well and truly to try said issue, and after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until Monday morning next.

22 Afterwards, to wit, on the 21st day of May, A. D. 1877, in the said adjourned May term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE PHŒNIX MUTUAL LIFE INSURANCE COMpany
vs.
HENRY H. KOON, MILTON J. BUTTS, AND AMOS C. Babcock, impleaded with John J. S. Wilson. } Debt.

Now come again the parties, by their attorneys, and now come also

the jury in this behalf empaneled and sworn, and by agreement of the parties by their attorneys Aaron L. Brown is excused from further service as a juror herein, the trial to proceed with the eleven jurors, and this verdict to have the same force and effect as though rendered by a full panel; and after hearing the concluding evidence and the arguments of counsel and receiving the instructions of the court, the jury retired to consider of their verdict, and by agreement of the parties by their attorneys, the jury when they shall have agreed upon a verdict may sign and seal the same and deliver it to the clerk and disperse.

Afterwards, to wit, on the 22d day of May, A. D. 1877, in the said adjourned May term of said court, in the record of the proceedings
23 thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY
vs.
HENRY H. KOON ET AL., &C. } Debt.

The eleven jurors in this behalf empaneled and sworn this day returned into court their sealed verdict, wherein they say, We, the jury, find the issue for the plaintiff, and we find its debt in the sum of ten thousand dollars, and assess its damages to the sum ten thousand dollars, and thereupon the defendant by their attorneys move the court for a new trial herein.

Afterwards, to wit, on the 26th day of July, A. D. 1877, in the July term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE PHŒNIX MUTUAL LIFE INSURANCE Company
vs.
HENRY H. KOON ET AL. } Debt.

Now come the defendants by their attorneys, and now comes on to be heard the motion of the defendants heretofore entered for a new trial of this cause; and after hearing the affidavits in support of said
24 motion and the argument of the defendants' counsel, the court takes the same under advisement.

Afterwards, to wit, on the 31st day of July, A. D. 1877, in the said July term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE PHŒNIX MUTUAL LIFE INSURANCE Company
vs.
HENRY H. KOON ET AL. . } Debt.

The court having considered and being now fully advised upon the motion of the defendants heretofore entered herein for a new trial of this cause, sustains said motion upon the payment within fifteen days of all the taxed costs herein.

Afterwards, to wit, on the 21st day of December, A. D. 1877, in the December term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, judge, is the following entry, to wit:

THE PHŒNIX MUTUAL LIFE INSURANCE Company
vs.
HENRY H. KOON ET AL. } Debt.

25 Now come the parties by their attorneys, and upon issue joined thereupon come a jury of good and lawful men, to wit, James H. Farrell, A. H. Heald, Albert Evans, Thomas Porter, J. E. Bostler, D. S. Putnam Thornton, G. Haines, W. M. Baker, Truman L. Platt, Ira C. Mosier, H. W. Thornton, and Elias Braman, who were all duly elected, tried, and sworn well and truly to try said issue; and after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

Afterwards, to wit, on the 22d day of December, A. D. 1877, in the said December term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. H. W. Blodgett, district judge, is the following entry, to wit:

THE PHŒNIX MUTUAL LIFE INSURANCE Company
vs.
HENRY H. KOON ET AL. } Debt.

Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn; and after hearing the concluding evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until Monday morning next.

26 Afterwards, to wit, on the 24th day of December, A. D. 1877, in the said December term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE PHŒNIX MUTUAL LIFE INSURANCE Company
vs.
HENRY H. KOON ET AL. } Debt.

Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing the arguments of counsel and receiving the instructions of the court the jury retired to consider of their verdict; and by agreement of the parties by their attorneys the jury when they shall have agreed upon a verdict may sign and seal the same and deliver it to the clerk and disperse.

Afterwards, to wit, on the 28th day of December, A. D. 1877, in said December term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE PHŒNIX MUTUAL LIFE INSURANCE COMpany
vs.
HENRY H. KOON ET AL. } Debt.

27 Now come the defendants by their attorney, and the jury in this behalf empaneled and sworn this day returned into court their sealed verdict, wherein they say, We, the jury, find the issue for the plaintiff, and we find the plaintiff's debt in the sum of ten thousand dollars, and assess its damages to the sum of seven thousand and five hundred dollars; and thereupon the defendants by their attorney move the court for a new trial herein.

Afterwards, to wit, on the 5th day of March, A. D. 1878, in the adjourned March term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE PHŒNIX MUTUAL LIFE INSURANCE COMpany
vs.
HENRY H. KOON ET AL. } Debt.

Now come the parties by their attorneys, and the motion of the defendants heretofore entered herein for a new trial of this cause now coming on to be heard, the defendants by their attorney move the court to correct the verdict of the jury herein entered, and after hearing the arguments of counsel on both motions, the court takes the same under advisement.

28 On the same day, to wit, the 5th day of March, A. D. 1878, said defendants by their attorneys filed in said clerk's office their motion to correct the record of the verdict of the jury in said entitled cause, which said motion is in the words and figures following, to wit:

Motion to correct record of verdict.

In the circuit court of the United States for the northern district of Illinois, at December term, A. D. 1877.

THE PHŒNIX MUTUAL LIFE INSURANCE COMpany
v.
HENRY H. KOON, AMOS C. BABCOCK, AND others. } Action of debt.

And the said defendants, Henry H. Koon and Amos C. Babcock, severally come and show to the court here, that the verdict of the jury as entered of record by the clerk is not the verdict of said jury as returned into court and signed by them. Wherefore the said defendants move the court to correct the said record entry so as to make the same conform to the verdict of the jury as returned and filed in said cause.

JAMES M. BEARDSLEY,
JAMES P. ROOT,
J. C. BARKER,
Att'ys for Def'ts.

(Endorsed:) Filed March 5, 1878. Wm. H. Bradley, cl'k.

29 Afterwards, to wit, on the 11th day of March, A. D. 1878, in the said adjourned March term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE PHŒNIX MUTUAL LIFE INSURANCE COMpany
vs.
HENRY H. KOON ET AL. } Debt.

Now come the defendants by James M. Beardsley, esq., their attorney, and by leave of the court withdraw their motion for a new trial heretofore entered herein.

Afterwards, to wit, on the 25th day of March, A. D. 1878, in the said adjourned March term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE PHŒNIX MUTUAL LIFE INSURANCE COMpany
v.
HENRY H. KOON, MILTON I. BUTTS, JOHN J. S. WILSON, and Amos C. Babcock. } Debt.

The court having considered, and being now sufficiently advised upon the motion of the defendants heretofore entered herein to correct
30 the verdict of the jury entered in this cause, overrules the same and awards judgment, to which the defendants by their attorney except. It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendants the said sum of ten thousand dollars, its debt so as aforesaid found, and that it have execution therefor, to be satisfied and discharged upon the marshal making thereon the said sum of seven thousand and five hundred dollars, its damages so as aforesaid assessed, together with its costs and charges in this behalf expended, amounting to the sum of one hundred and twenty-six dollars and ten cents.

And, on the same day, to wit, the 25th day of March, A. D. 1878, on the trial of said cause, the following exceptions were taken and allowed by the court and made of record in said entitled cause, to wit:

Bill of exceptions.

United States circuit court, northern district of Illinois, December term, 1877.

THE PHŒNIX MUTUAL LIFE INSURANCE COMpany
vs.
HENRY H. KOON ET AL.

Be it remembered that on the trial of this cause the plaintiff
31 read in evidence a written stipulation between the parties to said cause, and duly filed therein, which was in the words and figures following, to wit:

In the United States circuit court for the northern district of Illinois.

THE PHŒNIX MUTUAL LIFE INSURANCE COMpany
vs.
HENRY H. KOON, MILTON I. BUTTS, JOHN J. S. Wilson, and Amos C. Babcock.

We hereby consent that the defendants to above suit may introduce in evidence under the general issue any legal evidence at the trial of above cause that would be admissible if properly pleaded, without specially pleading the same, except such evidence as would tend to disprove or deny the validity of the execution of the bond upon which the said Phœnix Insurance Company is suing in above entitled suit.

UPTON, BOUTELL AND WATERMAN,
Att'ys for Pl'ff.

ROBERT G. INGERSOLL,
Att'y for A. C. Babcock.

JOHN C. BARKER,
Att'y for Koon and Babcock.

(Endorsed): Filed April 21, '77. Wm. H. Bradley, cl'k.

32 That during said trial the execution and delivery of said bond was not denied or put in issue, but, on the contrary, defendants' attorneys admitted the due execution and delivery of said bond, and only insisted as a defence to said bond that there was nothing due the plaintiff by reason of any alleged breaches thereof, and that the sureties had been released by the dealings between the plaintiff and the principal in the bond after the breach thereof. That, on the retirement of the jury to consider of their verdict, it was agreed by the parties that the jury might, when they had agreed upon their verdict, if the court should not then be in session, sign and seal the same and deliver the same to the officer in charge and disperse.

That on the opening of the court on the morning of the twenty-eighth day of December, of said term, the said jury, having in the meantime, when court was not in session, agreed upon their verdict and dispersed, and their said verdict, properly sealed, having been duly returned into court by the officer in charge of said jury, the court ordered said verdict to be opened and read, to which order the defendants objected because of the absence of the jury, which objection was overruled by the court, and the defendants duly excepted thereto, and the said verdict, being read, was found to be in the following words and figures, to wit:

33 "We, the jury, find for the plaintiffs and fix the sum due on the bond at $7,500, and damages at one cent," signed by all the jurors. The envelope in which the verdict was enclosed also contained another paper, on which was the following writing: "The undersigned jury signed the enclosed verdict as a compromise, being the largest amount we can get," signed by five of the jurors.

And thereupon the court directed the clerk to put the verdict in the following form: "We, the jury, find the issue for the plaintiff, and find the debt ten thousand dollars, and assess the damages at seven thousand five hundred dollars; the said debt to be discharged on payment of said damages."

To which action of the court, in changing the form of the said verdict in manner aforesaid, the said defendants then and there duly excepted.

Whereupon said defendants moved the court to correct the said record

entry, so as to make the same conform to the verdict of the jury in form as the same was returned, which motion was overruled by the court, and judgment rendered on the verdict in the form put by the order of the court to which defendants duly excepted.

And, inasmuch as said matters do not fully appear of record, pray the court to sign and seal this bill of exceptions, which is done.

H. W. BLODGETT,
Judge.

34 (Endorsed:) Filed March 25, 1878. Wm. H. Bradley, cl'k.

And afterwards, to wit, on the 3rd day of April, A. D. 1878, said defendants, by their attorneys, filed in said clerk's office their bond in said entitled cause, which said bond is in the words and figures following, to wit:

Bond.

Supreme Court of the United States, error to the northern district of Illinois.

HENRY H. KOON AND AMOS C. BABCOCK
v.
THE PHŒNIX MUTUAL LIFE INSURANCE COMpany of Hartford, Connecticut.

Know all men by these presents, that we, Henry H. Koon, of Wilmington, Will County, in the State of Illinois, Amos C. Babcock, of Canton, Fulton County, State of Illinois, and Charles B. Farwell, of the city of Chicago, county of Cook, and State of Illinois, are held and firmly bound unto The Phœnix Mutual Life Insurance Company, of Hartford, in the State of Connecticut, in the sum of ten thousand dollars, to be paid to the said Phœnix Mutual Life Insurance Company of Hartford, its successors or assigns, to which payment well, and
35 truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals. Dated this third day of April, A. D. 1878.

Whereas the above bounded Henry H. Koon and Amos C. Babcock have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the United States circuit court in and for the northern district of Illinois:

Now, therefore, the condition of this obligation is such, that if the above named Henry H. Koon and Amos C. Babcock shall prosecute their said writ of error to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and virtue.

HENRY H. KOON. [SEAL.]
AMOS C. BABCOCK. [SEAL.]
C. B. FARWELL. [SEAL.]

Approved.

H. W. BLODGETT.

(Endorsed:) Filed April 3d, 1878. Wm. H. Bradley, clerk.

36 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein The Phœnix Mutual Life Insurance Company is the plaintiff, and Henry H. Koon et al. are the defendants, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this 25th day of September, A. D. 1878, and our Independence the one hundred and third year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

37 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court, between The Phœnix Mutual Life Insurance Company, plaintiff, and Henry H. Koon, Milton D. Butts, John J. S. Wilson, and Amos C. Babcock, defendants, in an action of debt, a manifest error hath happened, to the great damage of the said Henry H. Koon and Amos C. Babcock, as by their complaint appears, and it *is* being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1878, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this second day of April, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the 102nd year.

WM. H. BRADLEY, *Clerk.*

A copy of this writ of error was deposited for said defendant in error in the clerk's office of the circuit court of the United States for the northern district of Illinois this second day of April, A. D. 1878.

WM. H. BRADLEY, *Clerk.*

38 UNITED STATES OF AMERICA, *ss:*

To the Phœnix Mutual Life Insurance Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the office of the clerk of the circuit court of the United States in and for the northern district of Illinois, wherein Henry H. Koon and Amos C. Babcock are plaintiffs and you are defendant in error, to show cause, if any there be,

why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this third day of April, in the year of our Lord one thousand eight hundred and seventy-eight.

H. W. BLODGETT, *Judge.*

39 Service accepted at Chicago this third day of April, A. D. 1878.

BOUTELL & WATERMAN,
Att'ys for Phœnix Mutual Life Ins. Co.

(Indorsement on cover:) No. 323. Henry H. Koon and Amos C. Babcock, pl'ffs in error, vs. The Phenix Mutual Life Insurance Company. N. Illinois C. C. U. S. Filed 30th October, 1878.

REC. 323—2

SUPREME COURT U.S.
FILED
MAR 30 1881
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1880.

No. 323.

HENRY H. KOON AND AMOS C. BABCOCK,
Plaintiffs in Error,

vs.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY,
Defendant in Error.

Error to Circuit Court, Northern District of Illinois.

R. G. INGERSOLL.
Of Counsel.

Thomas McGill & Co., Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1880.—No. 323.

HENRY H. KOON AND AMOS C. BABCOCK, PLAINTIFFS IN ERROR,

vs.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY, DEFENDANT IN ERROR.

ERROR TO CIRCUIT COURT, NORTHERN DISTRICT OF ILLINOIS.

STATEMENT OF THE CASE.

The plaintiffs in error were sued in the Circuit Court for the northern district of Illinois on a bond, the penalty of which was ten thousand dollars.

On the first trial, May 22, 1877, the verdict was set aside and a new trial granted.

On the 24th of December, 1877, the case was again tried. The bill of exceptions contains the following statement:

"That, on the retirement of the jury to consider of their verdict, it was agreed by the parties that the jury might, when they had agreed upon their verdict, if the court should not then be in session, sign and seal the same, and deliver the same to the officer in charge and disperse.

"That on the opening of the court on the morning of

the 28th day of December, of said term, the said jury having in the meantime, when court was not in session, agreed upon their verdict and dispersed, and their said verdict, properly sealed, having been duly returned into court by the officer in charge of said jury, the court ordered said verdict to be opened and read, to which order the defendants objected because of the absence of the jury, which objection was overruled by the court, and the defendants duly excepted thereto, and the said verdict, being read, was found to be in the following words and figures, to wit: 'We, the jury, find for the plaintiffs, and fix the sum due on the bond at $7,500, and damages at one cent,'—signed by all the jurors. The envelope in which the verdict was inclosed also contained another paper, on which was the following writing: 'The undersigned jury signed the inclosed verdict as a compromise, being the largest amount we can get,'—signed by five of the jurors.

"And thereupon the court directed the clerk to put the verdict in the following form: 'We, the jury, find the issue for the plaintiff, and find the debt ten thousand dollars, and assess the damages at seven thousand five hundred dollars; the said debt to be discharged on payment of said damages.'

"To which action of the court, in changing the form of the said verdict in manner aforesaid, the said defendants then and there duly excepted.

"Whereupon said defendants moved the court to correct the said record entry so as to make the same conform to the verdict of the jury in form as the same was returned, which motion was overruled by the court and judgment rendered on the verdict in the form put by the order of the court, to which defendants duly excepted." (Printed record, pp. 14, 15.)

From the judgment as so rendered the defendants sued out a writ of error.

STATUTES OF UNITED STATES.

Sec. 954, R. S., U. S.: "No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of

form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses." * * *

Sec. 914, R. S., U. S.: "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding." (17 Stat., 197.)

ILLINOIS STATUTES.

"*An act to revise the law in relation to amendments and jeofails.*" In force July 1, 1874.

"SEC. 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly*, That the court in which an action is pending shall have power to permit amendments in any process, pleadings, or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before the judgment rendered therein." (Page 137, R. S., 1874.)

Practice Act. Chapter 110.

"SEC. 56. It shall be sufficient for the jury to pronounce their verdict, by their foreman, in open court, without reducing the same to writing, and the clerk shall enter the same in form, under the direction of the court." (Stats. 1874, p. 781.)

ASSIGNMENTS OF ERROR.

The said Henry H. Koon and Amos C. Babcock, plaintiffs in error, say that the court below, in rendering judgment against them, contained in the record aforesaid, committed manifest error, in this, to wit:

1. That the said court erred in the trial of said cause in ordering the verdict of the jury to be opened and read, and in ordering the clerk to put the verdict in form, in the absence of the jury and without their assent.

2. That the said court erred in changing the form of the verdict, contrary to the intention of the jury, when it should have put their verdict in the following form:

"We, the jury, find the issue for the plaintiff, and find the debt ten thousand dollars, and assess the damages at one cent; the said debt to be discharged on payment of said damages."

3. That the said court erred in overruling defendants' motion to correct the record of the court in regard to the verdict of the jury in accordance with the facts.

ARGUMENT.

I.

The court below was governed by the practice act of the State of Illinois so far as the reception of the verdict was concerned. The uniform construction of the statute in regard to reforming informal verdicts is, that it shall be done in the presence of the jury, and be assented to by them, unless it was stipulated that it might be done in their absence.

"The Circuit Court usurped no improper authority in ordering and permitting the verdict into proper form before the jury had been discharged, and then refound by them."

Cook v. *Scott*, 1 Gilm., 341.

"There was the usual stipulation, as shown by the record, that the jury might sign and seal their verdict, and leave it with the clerk, and if it should not be in proper form, the court might put it in form without the presence of the jury. The verdict was sealed, and, on opening it, was found to read in this way: 'We, the jury, find the issues joined for the plaintiffs, and assess the damages at $2,408.14.'

"The form which it was made to assume by the court was: 'We, the jury, find the issues in favor of the plaintiffs, and find the debt $2,700, and the damages $2,408.14.'

"The action was debt for the penalty of a bond. This proved itself. The finding of the jury could add no additional force to it. They were only to find the damages."

Boynton v. *Phelps et al.*, 52 Ill., 220.

When the jury returned the following verdict, "We, the jurors, find for the plaintiff $450," and the court changed it to read, "and assess the damages at $450," it was held:

"The practice act provides that the jury may pronounce their verdict in open court without being in writing, by

their foreman, and it requires the clerk to enter the same in form, under the direction of the court. If, when presented in writing, it is informal, the practice has always authorized the court, in the presence of the jury, and with their assent, to put it in form. * * * The jury, before retiring from the box, adopted it, thus altered, as their verdict."

Osgood v. *Mc Connell*, 32 Ill., 77.

"When the court had put the verdict in form, and five jurors swore afterwards that it was a mistake, it was held they could not impeach their verdict.

"The jury were polled, when the court put the verdict in form, and were asked, when so put in form, if it was their verdict; to which they unanimously assented."

Suver v. *O'Riley*, 80 Ill., 104.

City of Pekin v. *Winkel*, 77 Ill., 57.

"The jury, in their written verdict, as returned into court, found only the damages.

"By the bill of exceptions in the amended record, it appears the judge, when the verdict was returned, entered upon his minutes both the debt and damages as having been found by the jury. * * *

"It does not appear that, at the time when the verdict was rendered, the jury or the counsel for the defendant consented that it should be amended by the court. The amendment was material, and could not be made without the consent of the jury themselves, or of counsel for defendant."

Bodine et al. v. *Swisher*, 66 Ill., 537.

"A verdict is not considered valid and final until pronounced and recorded in open court. Either party has the right to have the jury examined by the poll before the verdict is recorded. Before it is recorded they may vary from the first offer of their verdict, and the verdict which is recorded will stand. And there is no difference whether the verdict is brought in sealed or delivered verbally by the foreman. A direction to the jury to seal up their verdict and separate does not dispense with their personal at-

tendance in court when the verdict is opened, and if any of them dissent, the verdict cannot be recorded."

Martin v. *Morelock*, 32 Ill., 487.

The same rule obtains in other States. In New York the Court of Appeals held:

"Nor is there any doubt of the right of either party to poll the jury, on the rendition of a verdict by the foreman, at any time before it is recorded; (*Fox* v. *Smith*, 3 Conn., 23; *People* v. *Goodwin*, 18 J. R., 188;) and this, although the verdict has been a sealed one, and the jury have separated before bringing it in; unless the right to poll has been expressly waived. (*Bunn* v. *Hoyt*, 3 J. R., 255; 3 Conn., *supra*; *Jackson* v. *Hawks*, 2 Wend., 619; *Root* v. *Sherwood*, 6 J. R., 68; 4 N. Y., *supra*.)

"And where a jury has been authorized to bring in a sealed verdict, and has found it, put it in writing, sealed it, has separated, has the next morning come together in court and given it in—if the verdict be defective the court may direct them to retire again and consider it."

Warner v. *New York Central Railroad Company*, 52 N. Y., 440.

"The only verdict which can be received and regarded as a complete and valid verdict of a jury, upon which a judgment can be rendered, is an open and public verdict, given in and assented to in open court as the unanimous act of the jury, and affirmed and entered of record in the presence and under the sanction of the court. A convenient practice has been adopted in this country, authorizing the jury, when they agree during the adjournment of the court, to seal up their verdict and separate, and come in and affirm it at the next opening of the court. But in such case the verdict is to be affirmed in open court, as the unanimous act of the jury, and in presence of the whole panel, so that each juror has an opportunity to express his dissent to the court, in case his decision has been mistaken or misrepresented by the foreman or his fellows, as in case he has been forced into acquiescence by improper means. Such an affirmation is the only evidence the court can receive of the free and unanimous assent of the jury to the verdict."

Lawrence v. *Stearns*, 11 Pick., 501.

II.

The United States statutes do not authorize the judge to perform the functions of the jury without the consent of the parties. In all cases of trial by the court, it must be stipulated that a jury is waived.

In the case of *Patterson* v. *The United States*, 2 Wheat., 225, the jury found that the bond for $35,000 was executed by defendants, and that the amount due upon the bond was $23,989.58. Upon that verdict the Circuit Court entered up judgment for $35,000, to be released on payment of $23,989.58.

This court reviewed and reversed the judgment and held

"But whether the bond was the deed of the defendant or not, was not a matter in issue between the parties, and consequently it was a false conclusion to say that because it was his deed, therefore he was indebted to the United States.

"The rule of law is precise upon this point. A verdict is bad if it varies from the issue in a substantial manner, or if it find only a part of that which is in issue. * * * Whether the jury find a general or special verdict, it is their duty to decide the very point in issue; and, although the court in which the cause is tried may give form to a general finding, so as to make it harmonize with the issue, yet if it appears to that court, or to the appellate court, that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict."

"It is true that if the jury find the issue, and something more, the latter part of the finding will be rejected as surplusage."

In the case at bar the issues were:

1. Whether there had been a breach of the bond.
2. What damages had been sustained by the plaintiff.

The jury found a breach of the bond and damages of one cent, and, in addition, that they "fix the sum due on the bond at $7,500."

The court struck out the words "and damages at one cent." This left the verdict irresponsive to the issues, and no judgment could properly be rendered upon it.

If the court could change the verdict, it had no right to disregard the clear intention of the jury to give only nominal damages. If the court judged the verdict to be contrary to the evidence in regard to the damages, it had power to set it aside, but not to alter it; for this would be a usurpation of the province of the jury.

In the United States courts issues of fact cannot be tried and determined by the court unless authorized by statute, and under the statute (sec. 649, Rev. Stat.) only by virtue of a written stipulation waiving trial by jury, and filed with the clerk of the court.

Norris v. *Jackson*, 9 Wall., 127.

"The seventh amendment of the Constitution declares, that in suits at law, where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved. * * * The common law admitted of no re-examination of the facts found by a jury, except by granting a new trial in the same court in which the verdict was rendered, and the constitutional amendment just referred to forbids any other mode of re-examination than that which accords with the rules of the common law.

"As the defendant in this case did not waive his right to have the facts tried by a jury, it was the duty of the court to submit such facts to the jury that was sworn to try them."

"* * It is obvious that if such a verdict can be supported here, when the very act of the court in doing this is excepted to and relied on as error, the trial by jury may be preserved in name, but will be destroyed in its essential nature, and become nothing but the machinery through which the court exercises the functions of a jury without its responsibility."

Barney v. *Schmeider*, 9 Wall., 251, 252.

The rule in the case just cited applies to this case. It was usurping the functions of the jury to alter the verdict

in their absence from "one cent" damages to $7,500 damages. This amendment was not within the province of the judge, but it was a matter of right that it should be made by the jury, and not by the court.

In the case of *Nudd et al.* v. *Burrows*, 1 Otto, 439, this court held:

"Questions of law are to be determined by the court; questions of fact by the jury. The authority of the jury as to the latter is as absolute as the authority of the court with respect to the former.

"No question of fact must be withdrawn from the determination of those whose function it is to decide such issues.

"The line which separates the two provinces must not be overlooked by the court."

If the jury had found simply the sum due on the bond, it may be that the court could have corrected the verdict; or if the jury had simply found a verdict for damages, it may be that the court could have corrected the verdict by stating the amount due on the bond to be the penalty of the bond. But in this case the jury covered both branches, finding the sum due on the bond, and also the damages. Under these circumstances there was nothing left for the court to put in form. There was nothing left for the court to guess, except that the jury had given a wrong verdict.

The real and vital question to be decided by the jury was the damages that the plaintiff had suffered. The jury found the damages to be one cent, and the court changed this "one cent" to seven thousand five hundred dollars.

If the jury had simply returned a verdict for the penalty of the bond, the court could not have added a certain amount as damages. In this case, if any mistake was made, it was in the penalty of the bond, not in the amount of damages. If the court had the right to make the change that he did make, it is not easy to see the exact part played by the jury in this case. They found the damages to be one

cent. That part of the verdict is perfect as to form. They made a mistake in the penalty of the bond. That could have been corrected without changing the effect of the verdict, and no other change could be legal.

R. G. INGERSOLL,
Attorney for Plaintiff in Error.

SUPREME COURT U.S.
FILED
OCT 27 1881
JAMES H. MCKENNEY

IN THE

Supreme Court of the United States.

HENRY H. KOON, ET AL.,
Plaintiffs in Error,

vs.

PHOENIX MUTUAL LIFE INSURANCE COMPANY,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF FOR DEFENDANT IN ERROR.

LEWIS H. BOUTELL,
Of Counsel.

CHICAGO:
PRESS OF BEACH, BARNARD & CO., LEGAL PRINTERS, NO. 104 RANDOLPH STREET.
1881.

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LEWIS H. BOUTELL,
Of Counsel.

CHICAGO:
PRESS OF BRADY, HAGGARD & CO., LEGAL PRINTERS, NO. 164 RANDOLPH STREET.
1881.

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Plaintiffs in Error,

vs.

PHOENIX MUTUAL LIFE INSURANCE COMPANY,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

STATEMENT.

This was an action of debt on a bond, brought by defendant in error against plaintiffs in error. The penal sum of the bond was ten thousand dollars, and it was given to secure the faithful performance of said Henry H. Koon, of his duties as agent of said insurance company. The breaches alleged were the failure of said Koon to account for moneys of the insurance company received by him to an amount exceeding the penal sum of said bond. The plaintiff in error filed pleas of *nil debet*.

The following facts appear from the bill of exceptions. The counsel for the insurance company read in evidence on the trial a stipulation signed by all the parties to the suit, that the defendants in the original suit might introduce in evidence under the general issue, any legal evidence that would be admissible if properly pleaded, without specially pleading the same, except such evidence as would tend to disprove or deny the validity of the execution of the bond sued on.

During said trial the execution and delivery of said bond was not denied or put in issue, and the attorneys of the defendants admitted the due execution and delivery of said bond, and only insisted as a defense thereto that there was nothing due to the plaintiff by reason of any of the alleged breaches thereof, and that the sureties had been released by the dealings between the plaintiff and the principal in said bond after the breaches thereof.

On the retirement of the jury to consider ~~of~~ their verdict, it was agreed by the parties that the jury might, when they had agreed upon their verdict, if the court should not then be in session, sign and seal up the same, and deliver the same to the officer in charge, and disperse.

On the opening of the court on the morning of the 28th day of December of said term, said jury having in the meantime, when the court was not in session, agreed upon their verdict, and dispersed, and their verdict, properly sealed, having been duly returned into court by the officer in charge of said jury, the court ordered said verdict to be opened and read, to which order the defendants objected, because of the absence of the jury, which objection was overruled by the court, and the defendants duly excepted

thereto. And the said verdict being read, was found to be in the following words and figures, to wit:

"We, the jury, find for the plaintiffs, and fix the sum due "on the bond at $7,500, and damages at one cent." Signed by all the jurors. The envelope in which the verdict was enclosed, also contained another paper, on which was the following writing: "The undersigned jury signed the "enclosed verdict as a compromise, being the largest "amount we can get." Signed by five of the jurors.

And thereupon the court directed the clerk to put the verdict in the following form: "We, the jury, find the "issue for the plaintiff, and find the debt ten thousand dol- "lars, and assess the damages at seven thousand five hun- "dred dollars, the said debt to be discharged on payment of "said damages."

To which action of the court in changing the form of said verdict in manner aforesaid, the said defendants then and there excepted. Whereupon said defendants moved the court to correct the said record entry, so as to make the same conform to the verdict of the jury in form as the same was returned, which motion was overruled by the court, and judgment rendered on the verdict in the form put by the order of the court, to which defendants duly excepted.

The single question presented for the consideration of this court is, the right of the court below to amend the verdict of the jury in the manner above set forth.

BRIEF.

POWER OF COURT TO AMEND VERDICTS.

The court may amend a verdict in matters of form, where the intention of the jury is manifest.

In Hobart, 54 (time of James I., 1603–1625), the doctrine is thus laid down:

"But housoever the verdict seeme to stray and conclude "not formally or punctually unto the issue, so as you can "not find the words of the issue in the verdict, yet if a "verdict may be concluded out of it to the point in issue, "the court shall work it into forme, and make it serve."

This authority was followed by Lord MANSFIELD, in *Hauks* v. *Crofton*, 2 Burrows, 698, where he held "that "when the intention of the jury is manifest, and beyond "doubt, the court will set right matters of form."

This doctrine has never been questioned. If the verdict of the jury is responsive to the issues submitted to them, any defects in the form of the verdict may always be corrected by the court.

The only question then to be decided in the present case is this: Was the defect in this verdict one of form, or of substance?

The plaintiffs in error claim that the defect is substantial, and cite several Illinois cases in support of their view, in which it has been held that in an action of debt on a bond, the jury must find the debt as well as the damages. This means, of course, simply that the jury must pass on the validity of the bond as well as on the amount due on the bond. This would be so, undoubtedly, where the validity of the bond is drawn in question, for in such cases two issues really are submitted to the jury: 1st. Is the bond

a valid bond? 2d. What, if anything, is due on the bond?

The technical language in which they decide these points is, if the finding is for the plaintiff, debt, the penal sum of the bond; damages, the amount due on the bond. It is evident, from an examination of all the Illinois cases on this subject, that it is only when the validity of the bond is drawn in question, that it is a matter of substance for the jury to find the debt as well as the damages.

The first case was *Frazier* v. *Laughlin*, 1 Gilm., 347. This was debt on a bond. Plea, with others, *non est factum*. Verdict for plaintiffs, and damages assessed at so much. Judgment for the damages assessed.

CATON J., in delivering the opinion of the court, says the jury should have found the debt as well as the damages, "for it was as much the right of the party to have "that found by the jury as any fact."

Hinckley v. *West*, 4 Gilm., 136, was debt on bond. Among other pleas, *non est factum*. Verdict for damages. Judgment for debt and damages in usual form. The court (TREAT J.) followed *Frazier* v. *Laughlin*, and said: "The verdict was not broad enough. It did not find the "amount of the debt. That is a fact which the party has "the right to have found by a jury."

Austin v. *The People*, 11 Ills., 452, was debt on bond. Pleas, *non est factum* and *nil debet*. Verdict in damages. Judgment, debt and damages in usual form. The court (TREAT J.) followed the last two cases and said: "*The debt was not admitted by the pleadings*. It "was, *therefore*, the duty of the jury to have found as "well the amount of the debt as the damages."

Of similar purport are

Toles v. *Cole*, 11 Ills., 562.

Odell v. *Hale*, 25 Ills., 204.

The plaintiffs in error cite *Bodine* v. *Swisher*, 66 Ills., 536, where a similar doctrine was held, and where the pleas are not given. There are one or two other cases of a similar character. But there is no intimation in any of these cases that the validity of the bond was not in issue.

On the other hand, the following cases show, that when the validity of the bond is not in question, it is a mere matter of form for the jury to find the penal sum of the bond as debt, and if the jury find the amount due on the bond, the court may put the verdict into form.

In *O'Connor* v. *Mullen*, 11 Ill., 57, the action was debt on bond. The defendant was defaulted. On a writ of inquiry, the jury awarded a sum as damages, and judgment was entered therefor. Three years afterwards, while the case was pending in the Supreme Court, the Circuit Court amended its record, making the judgment for debt as well as damages. The court (TRUMBULL, J.), says: "We have no doubt of the authority of the Circuit "Court to allow the amendment. It was the correction "of a judgment in a matter of form only." It was also held that if the amendment had been made at the same time with the judgment, no notice to the opposite party would be necessary, but it having been made at a subsequent term, notice should have been given.

Boynton v. *Phelps*, 52 Ill., 210, 221, was debt on bond. Pleas not given. There was a stipulation, that the jury might seal their verdict, and if not in proper form, the court might put it in form. The verdict was for damages

simply. The court corrected it by adding the penal sum as debt. The court (BREESE, C. J.), say: "The action "was debt for the penalty of a bond. This proved itself. "The finding of the jury could add no additional force "to it. They were only to find the damages."

Although the pleas in this case are not given, it is clear, from the language of the court, that the validity of the bond was not in issue. That being so, the only substantial thing for the jury to do, was, as the court say, "to find the damages." All else was mere form. The stipulation does not affect the decision, as that only related to matters of form.

In *Brown* v. *Rounsavell*, 78 Ills., 594, the court say:

"The execution of the bond was not put in issue by "any plea verified by affidavit; so its execution stood ad- "mitted. The only thing in issue before the jury was, "whether there had been a breach of the condition of "the bond, and if so, then the amount of the damages."

This point has also been directly decided by the Supreme Court of the United States, in *Huff* v. *Hutchinson*, 14 How., 586. That was debt on bond. Plea *nil debet*. Verdict for amount due. It was moved in arrest of judgment among other things: "Because the verdict is in- "formal, in being entered for the amount due, when it "should have been for the penalty of the bond." But the court (M'LEAN, J.,) held: "This is a mere informality, "and no ground for arresting the judgment."

See also:

Brooklyn v. *Insurance Company*, 9 Otto, 362.

The plaintiffs in error cite *Ross* v. *Taylor*, 63 Ills., 215. But this was not debt on bond, but on a written agree-

ment. This case, and all similar cases, have no bearing on the present case. For in such cases the debt is for the amount due, and the damages for interest on the debt.

Jones v. *Lloyd*, Breese, 225.
Duncommun v. *Hylinger*, 14 Ills., 248.
Williams v. *Bank of Illinois*, 1 Gil., 667.

In the last case, the Supreme Court entered the proper judgment, as it could ascertain what the judgment should have been.

In the case at bar, the validity of the bond was not denied by the pleadings; by a written stipulation on file in the case, the defendants expressly agreed not to introduce any evidence affecting the validity of the bond; and on the trial its validity was expressly admitted. The only issue for the jury, therefore, was the amount due on the bond. To that issue their verdict is responsive, and all the court has done is simply, in the language of Hobart, to " work it into form."

LEWIS H. BOUTELL,

Of Counsel for Defendant in Error.

14 — 108

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~255.~~ 57

RICHARD JONES ET AL., PLAINTIFFS IN ERROR,

vs.

BEVERLY RANDOLPH ET AL.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 12, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 255.

RICHARD JONES ET AL., PLAINTIFFS IN ERROR,

vs.

BEVERLY RANDOLPH ET AL.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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4 *Joinder in issue.—May 7, '78.*

In the supreme court of the District of Columbia, May 7, 1874.

BEVERLY RANDOLPH ET UX. }
v. } Law. 11604.
RICHARD JONES. }

The plaintiffs join issue on the plea of the defendant above.

JOHN SELDEN,
Att'y for Pl'ffs.

Last pleading filed May 7, 1874.

FENDALL & DAVIDGE,
For Def't.

5 *Pl'ff's narr.—Filed Nov. 29, '73.*

In the supreme court of the District of Columbia, the 29th day of November, 1873.

BEVERLY RANDOLPH AND MARY B., HIS WIFE, plaintiffs, *v.* ADAM SIMMS AND ADAMS EHLSHLAGER, defendants. } At law. No. 11605.

The plaintiffs, in right of the said Mary B. Randolph, sue the defendants severally to recover the one undivided moiety or half part of the east half of lot numbered two (2) in square numbered two hundred and fifty-four (254), in the city of Washington, in the District of Columbia, which said east half of said lot fronts thirty feet eight and five-eighths inches (30 f't 8⅝ ins.) on E street north, and runs back a distance of one hundred feet (100 f't) to the depth of said lot, and of
6 which said undivided moiety or half part of said east half of the said lot, the plaintiffs, in right of the said Mary B. Randolph, were lawfully possessed on the 6th day of April, A. D. 1860, when the defendants, who are now in the actual occupation and claim to be possessed, of the said undivided moiety or half part of said east half of the said lot, severally entered the same and therefrom unlawfully ejected the plaintiffs, and thenceforward unjustly detained and still detain the same from the plaintiffs.

And the plaintiffs, in right as aforesaid, claim the possession of the said undivided moiety or half part of the said east half of the said lot, with the appurtenances and the costs of this suit.

JOHN SELDEN, *P. Q.*

The defendants are to plead hereto on or before the first special term of the court occurring twenty days after service hereof; otherwise, judgment.

JOHN SELDEN, *P. Q.*

Filed Nov. 29, 1873.

R. J. MEIGS,
Clerk.

7 *Plea.—Filed Ap.* 22, '74.

In the supreme court of the District of Columbia.

BEVERLY RALDOLPH ET UX. v. ADAM SIMMS AND ADAMS EHLSHLAGER. } At law. No. 11605.

The def't's deny the matters and things alleged in the said declaration.

REGINALD FENDALL,
Att'y for the Def't's.

Filed Apr. 22, 1874.

R. J. MEIGS,
Clerk.

8 *Replication.—Filed May* 7, '74.

In the supreme court of the District of Columbia, the 7th day of May, 1874.

BEVERLY RANDOLPH ET UX. v. ADAM SIMMS AND ADAMS EHLSHLAGER. } At law. No. 11605.

The plaintiffs join issue with the defendants on their above plea.

JOHN SELDEN,
Sol'r for Pl'ffs.

Last pleading filed May 7, 1874.

FENDALL & DAVIDGE,
For Def'd.

9 *Pl'ff's narr.—Filed Nov.* 29, '73.

In the supreme court of the District of Columbia, the 29th day of November, 1873.

HENRIETTA PENDLETON, PLAINTIFF, v. RICHARD JONES, DEFENDANT. } At law. No. 11606.

The plaintiff sues the defendant to recover the one undivided moiety or half part of the east half of lot numbered two (2), in square numbered two hundred and fifty four (254), in the city of Washington, in the District of Columbia, which said east half of the said lot fronts thirty feet and eight and five-eighths inches (30 ft. 8⅝ ins.) on E street north, and runs back a distance of one hundred feet (100 f't) to the depth of said lot, and of which said undivided moiety or half part of the said east half of said lot, the plaintiff was lawfully possessed on the 6th day of April, A. D. 1860, when the defendant, who is now in the actual occupation,
10 and claims to be possessed of the said undivided moiety or half part of said east half of the said lot, entered the same and therefrom ejected the plaintiff, and thenceforward unjustly detained and still detains the same from the plaintiff.

And the plaintiff claims the possession of the said undivided moiety

or half part of the said east half of the said lot, with the appurtenances and the costs of this suit.

JOHN SELDEN, *P. Q.*

The defendant is to plead hereto on or before the first special term of the court, occuring twenty days after service hereof; otherwise judgment.

JOHN SELDEN, *P. Q.*

(Endorsed:) 11606. Filed Nov. 29, 1873. R. J. Meigs, clerk.

11 *Plea.—Filed Ap. 22, '74.*

In the supreme court of the District of Columbia.

HENRIETTA PENDLETON } At law. No. 11606.
v.
RICHARD JONES. }

The def't denies the matter and things alleged in the said declaration.

REGINALD FENDALL,
Att'y for the Def't.

Filed Apr. 22, 1874.

R. J. MEIGS, *Clerk.*

12 *Replication.—Filed May 7, '74.*

In the supreme court of the District of Columbia, the 7th day of May, 1874.

HENRIETTA PENDLETON } At law. No. 11606.
v.
RICHARD JONES. }

The plaintiff joins issue with the defendants on their above plea.

JOHN SELDEN,
For Pl'ff.

Last pleading filed May 7, 1874.

FENDALL & DAVIDGE,
For D'f't.

13 *Pl'ff's narr.—Filed Nov. 29, '73.*

In the supreme court of the District of Columbia, the 29 day of November, 1873.

HENRIETTA PENDLETON, PLAINTIFF, }
v. } At law. No. 11607.
ADAM SIMMS AND ADAMS EHLSHLAGER, defendants. }

The plaintiff sues the defendants severally to recover the one undivided moiety or half part of the east half of lot number two (2) in square numbered two hundred and fifty-four (254), in the city of Washington, in the District of Columbia, which said east half of the said lot fronts thirty feet and eight and five-eighths inches (30 f't 8⅝ ins.) on E street

north, and runs back a distance of one hundred feet (100 f't) to the depth of said lot, and of which said undivided moiety or half part of the said east half of said lot the plaintiff was lawfully possessed on the 6th
14 day of April, A. D. 1860, when the defendants, who are now in the actual occupation and claim to be possessed of the said undivided moiety or half part of said east half of the said lot, severally entered the same and therefrom unlawfully ejected the plaintiff, and thenceforward unjustly detained and still detain the same from the plaintiff.

And the plaintiff claims the possession of the said undivided moiety or half part of the said east half of the said lot, with the appurtenances, and the costs of this suit.

JOHN SELDEN, *P. Q.*

The defendants are to plead hereto on or before the first special term of the court, occurring twenty days after service hereof, otherwise judgment.

JOHN SELDEN, *P. Q.*

(Endorsed:) 11607. Filed Nov. 29, 1873. R. J. Meigs, clerk.

15 *Plea.—Filed Ap.* 22, '74.

In the supreme court of the District of Columbia.

HENRIETTA PENDLETON
v.
ADAM SIMMS AND ADAMS EHLSHLAGER. } At law. No. 11607.

The def'ts deny the matters and things alleged in the said declaration.

REGINALD FENDALL,
Att'y for the Def'ts.

Filed Apr. 22, 1874.

R. J. MEIGS, *Clerk.*

16 *Replication.—Filed May* 7, '74.

In the supreme court of the District of Columbia, the 7th day of May, 1874.

HENRIETTA PENDLETON
v.
ADAM SIMMS AND ADAMS EHLSHLAGER. } At law. No. 11607.

The plaintiff joins issue with the defendants on their above plea.

JOHN SELDEN,
For Pl'ff.

Last pleading filed May 7, 1874.

FENDALL & DAVIDGE,
For Def't.

17 *Stipulation.—Filed June* 21, '75.

In the supreme court of the District of Columbia, the 21st day of June, 1875.

RANDOLPH ET UX.
v.
SIMMS & EHLSLAGER. } Law. 11605.

PENDLETON
vs.
JONES. } Law. 11606.

PENDLETON
vs.
SIMMS & EHLSHLAGER. } Law. 11607.

It is agreed that the above cases shall be tried together, and that Allison Nailor and Allison Nailor, jr., shall be and become parties defendant thereto in the same manner as if originally made so.

W. D. DAVIDGE,
Att'y for Def't.
SMITH & SELDEN,
For Pl'ffs.

Filed June 21, 1875.

18 *Proceedings in court.*

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said District, commencing the third Monday, eighteenth day of October, 1875.

THURSDAY, *December* 25, 1875.

The court resumes, &c., Chief Justice Cartter presiding.

BEVERLY RANDOLPH AND MARY B. RANdolph, his wife, pl'ffs,
v.
RICHARD JONES, ADAM SIMMS, AND ADAMS Ehlshlager, def'ts, } At law. No. 11604. Cal. 88. At law. No. 11605. Cal. 89.

and

HENRIETTA PENDLETON, PL'FF,
vs.
RICHARD JONES, DEF'T. } At law. No. 11606. Cal. 90.

and

HENRIETTA PENDLETON, PL'FF,
v.
ADAM SIMMS & ADAMS EHLSHLAGER, DEF'TS. } At law. No. 11607. Cal. 91.

19 By agreement of parties, by their respective attorneys, the above four cases are consolidated and to be tried as one. (M. 11, p. 177.)

20 *Proceedings in court.*

Proceedings before the supreme court of the District of Columbia holding a special term and circuit court in and for said District, commencing the fourth Monday, 22nd day of January, 1877.

WEDNESDAY, *February* 28, 1877.

Session resumed pursuant to adjournment, Chief Justice Cartter presiding.

BEVERLY RANDOLPH & MARY B., HIS WIFE, & Henrietta Pendleton, pl'ffs, *vs.* RICHARD JONES, ADAM SIMMS, AND ADAM Ehlshlager, def'ts. } At law. No. 11604.

Now come here as well the plaintiffs by their attorney, Mr. Selden, as the defendants by their attorney, Mr. Davidge, and a jury of good and lawful men of the District, to wit: J. Bradley Adams, William
21 H. Holledge, Daniel Smith, George W. Harkness, Charles W. Pettit, Jared C. Nichols, William Lord, Charles T. Eloman, Reuben F. Baker, George Gibson, Anthony Gaigler, and George S. Galt, who being duly sworn to try the issue above joined are respited until the meeting of the court to-morrow. (Minutes 12, p. 309.)

THURSDAY, *March* 1, 1877.

Session resumed pursuant to adjournment.

(Title.)

Now again come here the parties aforesaid in manner aforesaid, and he same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court to-morrow. (Minutes 12, p. 310.)

FRIDAY, *March* 2, 1877.

22 Session resumed pursuant to adjournment, Chief Justice Cartter presiding.

(Title.)

Now again come here the parties aforesaid in manner aforesaid, and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court to-morrow. (Minutes 12, p. 311.)

SATURDAY, *March* 3, 1877.

Session resumed pursuant to adjournment, Chief Justice Cartter presiding.

(Title.)

Now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after the case is given them in charge, on their oath say they find the issue aforesaid in favor of the plaintiffs.

23 Therefore it is considered that the plaintiffs recover against said defendants possession of the east half of lot numbered two in square numbered two hundred and fifty-four (254,) in the city of Washington, in the District of Columbia, as aforesaid, and $ for their costs of suit; and have execution thereof.

Motion for new trial.—Filed Nov. 3, '77.

And thereupon the defendants move the court for a new trial, for the following grounds:

1st. The verdict of the jury was against the evidence.

2nd. The verdict was against the instructions of the court.

3d. The court erred in ruling that to entitle the defendants to the defence of limitations it was necessary that the jury should find that the terms of sale prescribed by the advertisement under which the property was sold had been complied with by payment of the purchase-money, as shown by the qualification of the defendants' prayer.

24 4th. The court erred in granting prayers Nos. 1 and 3, and each of them, at the instance of the plaintiffs. (Minutes 12, p. 312.)

25 *Undertaking for appeal & stay of execution.—Filed M'ch 13, '77.*

In the supreme court of the District of Columbia, the 13th day of March, 1877.

RANDOLPH ET AL. *vs.* JONES ET AL. } At law. No. 11604, 11605, 11606, 11607, consolidated.

Allison Nailor, one of the defendants in the above-entitled cause, having filed a motion for a new trial, and desiring to suspend the entry of judgment and the issuing and levy of execution on the verdict therein, and Allison Nailor, jr., his surety, for themselves and each of them, their and each of their heirs, executors, and administrators, appearing now and submitting themselves, by this undertaking, to the jurisdiction of the court, hereby undertake to abide by, perform, and pay its judgment in said cause, which may be entered against each of them on the overruling of said motion.

ALLISON NAILOR. [L. S.]
A. NAILOR, JR., [L. S.]
Surety.

Witness:
WM. G. HENDERSON.

Approved March 13, 1877.

D. K. CARTTER,
Ch'f Just.

26 *Hearing in gen. term ordered in first instance.—M'ch 31, 1877.*

SATURDAY, *March* 31, 1877.

Session resumed pursuant to adjournment, Chief Justice Cartter presiding.

(Title.)

The court orders the defendants' motion for a new trial to be heard in the general term in the first instance. (Minutes 12, p. 379.)

27 *Statement on motion for new trial, and bills of exception.—Filed April 28, 1877.*

Supreme court of the District of Columbia.

BEVERLY RANDOLPH AND MARY B., HIS WIFE, *vs.* RICHARD JONES. } At law. 11604.

SAME *vs.* SIMMS & EHLSHLAGER. } 11605. Consolidated with 11604.

HENRIETTA PENDLETON *vs.* RICHARD JONES. } 11606. Consolidated with 11604.

SAME *vs.* SIMMS & EHLSHLAGER. } 11607. Consolidated with 11604.

Statement of evidence.—Filed Ap. 28, '77.

Statement of the evidence.

At the trial of these causes, consolidated by the court, and brought to recover the east half of lot 2, in square 254, in the city of Washington, the plaintiffs, to maintain the issues on their part joined, read in evidence sundry conveyances whereby the title to the property in controversy vested on or about the 4th of March, 1819, in William O'Neale, in fee-simple. The plaintiffs further gave evidence tending to prove that said O'Neale died on the 24th of October, 1837, in possession of the property, and read in evidence his will and the codicil thereto, hereunto annexed as part hereof, and marked Exhibit A.

The plaintiffs further gave evidence tending to prove that said O'Neale at his death left a widow, Rhoda O'Neale, who died on the 6th day of April, 1860, and that the plaintiffs Mary B. Randolph and Henrietta Pendleton are the children of Mary B. Randolph mentioned in said
28 will and codicil; that the said plaintiffs were born in the city of Washington, D. C., in 1825 and 1827; that the former, in 1847, intermarried with Beverly Randolph, who is still living, and the latter, in 1850, intermarried with William H. Pendleton, who died in March, 1873; that after their marriages the said plaintiffs resided in the State of Virginia, the former in Clarke County and the latter in Fauquier County, but occasionally visited the city of Washington; that at and before the death of said O'Neale there were two houses on the property, which, after his death, were occupied by tenants until 1845; and that sundry rents were paid to Mrs. Margaret Eaton on account of her mother, the said widow of O'Neale; and that said Margaret, while the widow of John B. Timberlake, had intermarried with Gen. Eaton in 1829; and there the plaintiffs rested.

The defendants then read in evidence a deed of trust from said O'Neale to William A. Bradley, dated November 12, 1820, and hereunto annexed as part hereof, marked Exhibit B, and further gave evidence tending to prove that the note secured by said deed of trust was from time to time curtailed by partial payments, and renewed by the maker and endorser,

until the 28th of October, 1828, when there was due upon it the sum of $1,500; that the note held in renewal then lay over unpaid for four years and six months, until April 28, 1832, on which day a payment of $405 was made by said O'Neale, and that, subsequently, payments for principal and interest were also made by him, and that the amount due on the debt on the 31st of December, 1839, for principal and interest, was $1,072.41; that on said last-mentioned day French S. Evans, the guardian of Margaret R. Timberlake, the daughter of John B. Timberlake, the endorser, who died in 1828, paid to said bank the said
29 sum of $1,072.41, and that thereupon the said bank assigned the note of said O'Neale, held by it, to the said guardian, and ordered the transfer to said guardian of the right of the bank to said deed of trust, a copy of which order is hereunto annexed as part hereof, marked Exhibit C; that on the 5th of March, 1845, the National Theatre was destroyed by fire, and the said two houses on the lot in controversy were, by the same fire, destroyed, the walls only being in part left standing; that at and before the date of said deed of trust, William A. Bradley was the cashier of the Bank of Washington, and continued such until the 17th of July, 1827; that James Adams was the successor of said Bradley in said office of cashier, and continued to hold said office until July 1, 1870; that on the 25th of August, 1845, the said James Adams advertised for sale in the National Intelligencer, a newspaper published in the said city of Washington, the property mentioned and described in said deed of trust, a copy of which advertisement, made part hereof, and marked Exhibit D, is hereunto annexed; that said advertisement was published on the said 25th of August, 1845, and thereafter twice a week until the 20th of September, 1845, the day of sale, and on said day of sale, and that said advertisement was further published on September 22, 1845, with the following note at its foot:

The above sale is postponed until Saturday, 4th of October ensuing, at the same hour and place.

JAS. ADAMS, *Cashier.*
BOTELER, DONN & CO., *Auctioners.*

Sept. 22—3t.

The defendants, having first laid the foundation for the introduction of parol proof by showing the destruction or loss of the books of said Boteler, Donn & Co., auctioneers, further gave evidence, by Allison Nailor (the defendant in interest, the defendants on the record
30 being his tenants), that some time after the burning of the theatre he saw the advertisement of the property in the National Intelligencer, and attended the sale on the premises; that the auctioneer who cried the property was Charles Boteler, since deceased; that James Adams was on the ground; that the bell was rung, the advertisement read, and the property cried by said auctioneer and knocked down to the witness for the sum of $1,600 and perhaps a fraction over; that the cash required was handed to the auctioneer under the direction of said James Adams, and that for the balance of the purchase money three notes of $400 each, as witness thought, were given, with John Hands as endorser; that said notes were paid before maturity; that said Hands, the endorser, has since died; that witness at once entered into possession of the property as purchaser, and rebuilt the houses at a cost of from $5,000 to $6,000.

On cross-examination the witness said he could not recollect whether he had demanded or not a deed from Adams, but that the latter had promised to give witness the deed for the property.

The defendant then gave evidence, by Thomas Phillips, that he had lived in Washington since 1840, and recollected the burning of the National Theatre, and the subsequent sale of the property in controversy; Boteler and Donn were the auctioneers; the late Thomas Berry was at the sale; he carried on business as a stone-cutter near the property sold; that at the sale Allison Nailor bought, and that the witness saw and heard the property knocked down to Nailor; that the auctioneer wanted some money and Nailor pulled a roll of notes out of his pocket and paid some money to the auctioneer; that after the sale Nailor improved the property and wanted witness to buy one of the houses.

31 The witness further testified that since he was requested by Nailor to buy one of the houses his attention was not called to the subject of the sale until the last trial, and that he then recollected the sale, when during the progress of the trial he was asked about it by Allison Nailor, the defendant.

The defendants then gave evidence of the death of Thomas Berry, a witness at the last trial, and further gave evidence, by Edgar A. Bates, that he was a juror at said trial, and that Thomas Berry was examined as a witness at said trial, and testified that in 1845 he carried on the business of stone-cutting near the property sold, and was present at the sale; that he wanted to buy and stood back for Nailor, and that Nailor bought the property, and that he (Berry) saw the property knocked down to Nailor; and by W. C. O'Meara that witness was a juror at the last trial, and that Thomas Berry was examined as a witness at said trial, and testified that he attended the sale with some notion of buying the property himself, and that the property was knocked down to Allison Nailor; that Berry did not testify with the same distinctness that Phillips did; that witness thinks there was some obscurity in Berry's testimony, and that he simply gave his impression; and by Wm. H. Slater that he was a juror at the last trial and heard the testimony of Thomas Berry; that said Berry testified to the fire at the National Theatre in March, 1845, and that he was at the sale in the fall of 1845; that he went there to buy, but gave way to Nailor; that Nailor bought the property; that witness understood Berry to say that he recollected distinctly that the property was knocked down to Nailor.

The defendants further gave evidence tending to prove that after the said Allison Nailor entered into possession upon purchasing the property in the fall of 1845, as aforesaid, he improved the same, rebuilt the

32 houses, and has ever since collected the rents and profits thereof; and that since the fall of 1845 Nailor has held the open, exclusive, and adverse possession, claiming title to the same as absolute owner; that William A. Bradley died in the year 1867, and that James Adams is now living, but, through age and infirmity of mind and memory, incompetent to testify; and then rested.

Then plaintiffs then produced as a witness French S. Evans, who testified that he was guardian of Margaret R. Timberlake; that General Eaton, then abroad as United minister to Spain, and who had married the widow of John B. Timberlake, wrote to the witness and instructed him to pay the balance of the note of William O'Neale, held by the Bank of Washington, out of moneys belonging to the said ward of witness; that the witness accordingly did so, and received the note and other papers from Dr. Gunton, the president of the bank, and filed them in the orphans' court when he settled his last account; the witness subsequently collected rents from the property; that he collected rents because the property had been assigned to his ward by the banks; and that he settled his first, second, and third and final accounts in the

Defendants' prayer.

If from the whole evidence the jury shall find that in the fall of 1845, and whilst the deed of trust read in evidence was in force, the property was exposed to public sale by James Adams, cashier of the Bank of Washington, and at said sale was struck off to the defendant, and that thereupon the defendant, claiming title to the property, entered into possession thereof, and subsequently improved the same, and held the open and adverse possession thereof for the period of twenty years, then such entry and holding under claim of title are a bar to any title of the plaintiff s. And such bar is not affected by the question whether the terms of sale were complied with or not, nor by the institution of the proceedings in ejectment in 1854.

But the court refused to grant said prayer, to which refusal the defendants at the time duly excepted, and pray the court to sign, seal, and cause to be enrolled this, their second bill of exceptions, which is accordingly done this 3d day of March, 1877.

[SEAL.] D. K. CARTTER,
Ch' f Just.

37 And thereupon the court modified the said prayer of the defendants, and instructed the jury as follows:

If from the whole evidence the jury shall find that in the fall of 1845 and whilst the deed of trust read in evidence was in force, the property was exposed to public sale by James Adams, cashier of the Bank of Washington, and was at said sale struck off to the defendant as the highest bidder, and that thereupon the defendant complied with the terms of sale by the payment of the purchase-money, and, claiming title to the property, entered in possession thereof, and subsequently improved the same, and held the open and adverse possession thereof for the period of twenty years, then such entry and holding, under claim of title, are a bar to any title of the plaintiffs, and such bar is not affected by the institution of the proceedings in ejectment in 1854; and, after the lapse of time from said purchase the law presumes that the terms of sale were duly complied with, in the absence of proof to the contrary.

And to the modification of said prayer, relating to compliance with the terms of sale by payment of the purchase money, and to the said instruction as given, the defendants at the time duly excepted, and pray the court to sign, seal, and cause to be enrolled this their third bill of exceptions, which is accordingly done this 3d day of March, 1877.

[SEAL.] D. K. CARTTER,
Ch' f Just.

And thereupon the jury retired to deliberate upon their verdict, and returned into court and gave their verdict for the plaintiffs for the premises in controversy.

38 *Exhibits.*

EXHIBIT A.

I, William O'Neale, being of sound and disposing mind, memory, and understanding, knowing the certainty of death, and being desirous of

settling all my temporary concerns, do hereby make and declare this to be my last will and testament:

1st. To my beloved wife, Rhoda, I give and bequeath all my personal property, of every description whatsoever, to be kept or disposed of, for her own use and benefit, at her will and pleasure. I also give and bequeath to my beloved wife aforesaid, during her natural life, all the proceeds and income from my estate, of every description, requiring only, that after paying my debts and funeral expenses, she shall pay all taxes now due and which may be hereafter imposed, by the corporation of Washington, upon the property of my estate.

2d. At the death of my beloved wife I give and bequeath all my real property and all other property which may then belong to my estate, as follows: John H. Eaton and Tho. Carbery, or the survivor of them, or any person or persons whom they, or the survivor of them, may think proper to appoint, shall divide my estate into four equal parts, to be distributed as follows:

One-fourth part I give and bequeath to the children of my daughter, Margaret L. Eaton, and to their heirs and assigns, forever.

One other fourth part I give and bequeath to the children of my daughter, Mary B. Randolph, and their heirs and assigns, forever.

One other fourth part I give and bequeath to the children of my daughter Georgeanna Evans, and to their heirs and assigns, forever.

39 And the other fourth part I give and bequeath to my son, John P. O'Neale, and his heirs and assigns, forever. It is my wish and desire, and I hereby direct, that if my son John H. P. O'Neale shall die without issue, then, and in that case, the portion and share of property herein willed to him, shall be divided in three equal parts or portions, and is to go to the children of my daughters Margaret L. Eaton Mary C. Randolph, and Georgeanna Evans, and their heirs and assigns, forever.

Notwithstanding the disposition made of the property herein willed to my son, John H. P. O'Neale, it is hereby declared to be my will and testament that if my son-in-law, John H. Eaton, shall, at any time after the death of my wife, think proper to permit my said son, John H. P. O'Neale, to sell and dispose of all or any portion of the property hereby left to him, and to give a deed or deeds in fee for the same, then, and in that case, such sales and conveyances shall and are hereby declared and willed to be good and valid and binding upon my estate.

It is my intention that the property herein divided among my heirs shall be portioned off as hereinbefore divided, without law suit or litigation; and I hereby cut off any of said heirs who shall commence or be engaged in any law suit to defeat the true intent and meaning of this my last will and testament as herein expressed.

Lastly, I constitute and appoint my beloved wife, Rhoda, John H. Eaton, and Thomas Carbery, executors of this my last will and testament, revoking all former wills made by me.

In testimony whereof I have hereunto set my hand and seal this twenty-fourth day of Jan'y, 1837.

WM. O'NEALE. [SEAL.

Signed, sealed, and acknowledged in the presence of us:

R. JOHNSON.
A. S. HOOVER.
FLODORADO HOWARD.

Codicil to the last will and testament of William O'Neale, made 29th August, 1837.

I, William O'Neale, being of sound and disposing mind, memory, and understanding, do make and execute the following change and
40 alteration in my last will and testament, viz:

All that parcel and portion of property hereinbefore willed to the children of my daughter, Mary B. Randolph, and to their heirs and assigns forever, I now will, give, and bequeath, at the death of my beloved wife, Rhoda, to the children of my daughter, Margaret L. Eaton, the children of my daughter, Georgeanna Evans, and to my son, John H. P. O'Neale, and to their heirs and assigns forever. I now will, give, and bequeath, to the children of my daughter, Mary B. Randolph, to their heirs and assigns forever, the east half of lot No. 2, in square 254, with the two brick houses thereon, to be equally divided between them; not, however, until deceased of my beloved wife Rhoda. All other parts of my will I leave as it was originally drawn up.

In testimony whereof I have hereunto set my hand and seal this twenty-ninth day of August, 1837.

WM. O'NEALE. [SEAL.]

Witness:
R. JOHNSON.
A. HOOVER.
F. HOWARD.

EXHIBIT B.

This indenture, made the eleventh day of November, in the year one thousand eight hundred and twenty, between William O'Neale, of the city of Washington, District of Columbia, of the first part, and William A. Bradley, cashier of the Bank of Washington, of the same place, of the second part, witnesseth:

That whereas John B. Timberlake is endorser on a note for nineteen hundred and eighty dollars, drawn by the said William O'Neale, which note is discounted in the Bank of Washington for the use and benefit of the said William O'Neale, and the said John B. Timberlake agrees to renew the said endorsement from time to time, until the said note shall be paid, if desired so to do:

Now, therefore, in consideration of the aforesaid agreement on the part of the said John B. Timberlake, and of the sum of one dollar in hand paid by the said William A. Bradley to the said William
41 O'Neale, at or before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, the said William O'Neale hath granted, bargained, sold, aliened, and conveyed, and by these presents doth grant, bargain, sell, alien, and convey, unto the said William A. Bradley, and his successor as cashier of the Bank of Washington aforesaid, all that part of a certain piece or parcel of ground, lying in the city of Washington, and known and described in the ground plan of the said city as part of lot numbered two, in square numbered two hundred and fifty-four; beginning at the east line of said lot, fronting on E street north, and running westerly thirty feet, and in depth running the whole of said lot, being that part of the said lot on which two two-storied brick houses have been erected by the said William O'Neale; together with the said two brick houses and all other the buildings thereon, and all and singular the other improvements, ways, alleys, advantages and appurtenances thereunto belonging, or in any manner appertaining:

To have and to hold the premises aforesaid, with the appurtenances, unto him, the said William A. Bradley and his successor, in trust, nevertheless, to and for the following uses, intents, and purposes, that is to say: that if the said William O'Neale shall fail to pay the said note, or any note or notes which may be given for the renewal of the same, when the same shall become due, or any part thereof, that then and in such case the said William A. Bradley or his said successor shall, and are hereby authorized and empowered, to enter upon and take possession of the premises aforesaid, and to sell the same at public or private sale, for cash or on credit, as he may think best, and from the moneys thereby arising to pay in the first place all expenses of such sale; secondly, to pay and discharge the aforesaid note, with the interest thereon, or so much thereof as may remain due and unpaid; the residue or surplus, if any, of the moneys arising from said sale to be paid over to the said William O'Neale, his executors, administrators, or assigns. And the said William O'Neale doth hereby fully authorize and empower the said William A. Bradley or his said successor to enter upon and take possession of the aforesaid described premises, and to convey the same to the purchaser or purchasers.

42 In witness whereof the said William O'Neale hath hereunto subscribed his name and affixed his seal, the day and year first herein written.

WILLIAM O'NEALE. [SEAL.]

Signed, sealed and delivered in presence of—
R. T. BRISCOE.
JNO. N. MOULDER.

DISTRICT OF COLUMBIA,
County of Washington:

This eleventh day of November, in the year 1820, personally appears before the subscribers, two of the justices of the peace of said county, William O'Neale, the party grantor of the within instrument, and acknowledged the same to be his voluntary act and deed for the purposes therein mentioned. At the same time, also, personally appears Rhoda O'Neale, wife of the said William, who acknowledges the same to be also her act and deed, and the said Rhoda O'Neale, being by us privately examined apart from and out of the presence and hearing of her said husband whether she doth make her acknowledgment willingly and freely, and without being induced thereto by fear of threats or ill-usage by her said husband, or through fear of his displeasure, acknowledgeth that she doth.

R. T. BRISCOE.
JOHN N. MOULDER.

EXHIBIT C.

Extract from minutes of the Bank of Washington.

Tuesday, December 31, 1839.—The board met. Present, Messrs. Burche, Gideon, Murray, Emack, Dyer, and Dickens.

Mr. Burche was called to the chair, in the absence of the president.

Several notes were received. R. C. Washington, James Birth, John

Boyle, George Carroll, John F. Callan, Walter Hellen, and Ra-
43 phael Simms were appointed judges of the election at the election for directors for the ensuing year, to be held on Monday the 6th of January, 1840.

That French S. Evans having paid to the bank one thousand and seventy-two dollars and forty-one cents, the balance due on William O'Neale's note, the board ordered a transfer of the right of the bank to all the property conveyed in trust to secure the payment of said debt, the transfer to be made to F. S. Evans, guardian of M. R. Timberlake.

EXHIBIT D.

Sale of valuable real estate near the National Theatre.

The subscriber, by virtue of a deed of trust from William O'Neale to William A. Bradley, cashier of the Bank of Washington, and his successor or successors, bearing date the 11th day of November, in the year 1820, and recorded in liber W. B., No. 1, folios 148, 149, et seq., one of the land records of Washington County, in the District of Columbia, will offer for sale, at public auction, on the 20th day of September next, all that piece or parcel of ground in the said city, being part of lot numbered two (2), in square two hundred and fifty-four (254), beginning for said part at the east line of said lot, fronting on E street north, and running westerly thirty feet, and in depth the whole of said lot, being that part of said lot on which two two-storied brick houses were erected by the said William O'Neale, together with the said two-storied brick houses, and all other improvements thereon.

Terms: One-fourth cash; the balance in equal instalments at four, eight and twelve months, for which the purchaser will be required to give his notes, bearing interest, to be secured by deed of trust on the property.

Sale to be on the premises in the neighborhood of the National Theatre, at 4 o'clock p. m.

The trustee reserves the privilege of selling the property at the risk and expense of the purchaser if the terms are not complied with in three days. Deeds at the expense of the purchaser.

JAS. ADAMS, *Cashier*.

Aug. 25-2awdt&ds.

44 EXHIBIT E.

The first account of French S. Evans, guardian to Margaret R. Timberlake.

This accountant charges himself with this sum received from the U. States, on account of a pention, at $10 per month, from 2 April, 1828, to 1 of July, 1839	$1,349	33
From same from 1 July, 1839, to 1 Jan'y, 1840	60	00
" J. Powell, for 1 month's rent	12	50
" Mrs. Sessford, " "	12	50
" J. Powell, " "	12	50
" " " "	12	50
" Mrs. Sessford, in part for rent	5	00
" J. Powell, "	20	00
" Same in full to 20 June, 1840	13	00
" J. Fill, 3 months' rent, 2 August, '40	37	50
" U. States pension, from 1 Jan'y to 1 Jan'y, '40	60	00
" C. Davis, for month of July	12	50

From same, in part, for August, 1840	7 50
" G. Fitzhugh, in gu'd'n in Va	100 00
" J. Fill, 3 months' rent	37 50
" Same, in part, for November	2 50
" Bank of Washington, premium on $1,072.41, @ 6 per ct.	64 37
	$1,819 20

And he prays credit for the following payments, to wit:

Paid Ed. N. Roach, per voucher No. 1	$2 87½
" Bank of Washington, " 2	1,072 41
" John H. Eaton, per voucher No. 3	497 87
" expenses in getting pension certified	1 50
And a commission of 10 per ct. on $1,819.20	181 92
Also, fees to register of wills on this account, voucher 4	4 50
	$1,761 08
Bal. due by guardian	58 12
	$1,819 20

45 DISTRICT OF COLUMBIA,
Washington County, to wit:

ORPHAN'S COURT, *Jan'y* 8, 1841.

This day appeared French S. Evans, guardian as aforesaid, and made oath on the Holy Evangels of Almighty God, that the aforegoing account as stated is just and true; that he has bona fide paid or secured to be paid the several sums for which he claims a credit, which is by the court allowed and passed.

Test:

ED. N. ROACH,
Reg. Willo.

EXHIBIT F.

The second account of French S. Evans, guardian to Margaret R. Timberlake.

This accountant charges himself with the balance due on last account	$58 12

And with the following money, collected since last accounts, to wit:

From Mrs. Cochrane, for rent	9 00
" Navy agent, on ac. of pension, from 1 of July, 1840, to 1 of Jan'y, 1841	72 00
" J. Fill, for rent	35 00
" Mrs. Cochrane, same	7 00
" Geo. Fitzhugh, Va	132 00
" Mrs. Cochrane, rent	10 00
" Geo. Fitzhugh, gu'd'n, Va	30 00
" Mrs. Cochrane, rent	11 00
" " "	19 50
" J. Fill, "	37 50
" Mrs. Cochrane, "	6 25
" " "	11 00

From J. Fill	rent	37 50
" S. S. Beck,	"	10 00
" "	"	15 00
" Mills & Mitchell,	"	42 50
" S. S. Beck,	"	12 50
From J. Fill,	"	37 50
46 From S. S. Beck,	rent	12 50
" "	"	3 00
		$608 87

And he prays a credit for the following payments, to wit:

Paid insurance office, per	voucher No. 1		$8 00
" Jno. H. Eaton,	"	" 2	310 00
" T. B. Sprigg,	"	" 3	4 50
" Paul Jones,	"	" 4	2 00
" Ambush & Sanders,	"	" 5	8 00
" Luke Richardson,	"	" 6	75
" J. Fill,	"	" 7	3 00
" Thos. Stanley,	"	" 8	30 00
" Geo. Plant,	"	" 9	4 50
" Willett & Diggs,	"	" 10	28 00
And a commission of 10 per cent. on $550.75			55 07
Also fees on this account,	"	11	5 00
			$458 52
Bal. due by guardian			150 05
			$608 87

DISTRICT OF COLUMBIA,
Washington County, to wit:

ORPHANS' COURT, *Jan'y* 11, 1842.

This day appeared French S. Evans, guardian aforesaid, and made oath on the Holy Evangels of Almighty God that the foregoing account is just and true; that he has bona fide paid, or secured to be paid, the several sums for which he claims a credit, which is by the court allowed and passed.

Test:

ED. N. ROACH,
Reg'r Wills.

47 EXHIBIT G.

The third and final account of French S. Evans, guardian to Marg't R. Timberlake.

This accountant charges himself with the balance due on last account $150 05

And with the following money collected since last account, to wit:

From G. Powell, for	rent	15 00
" J. Fill,	"	37 50
" G. Powell,	"	17 50
		$220 05

And he prays credit for the following payments, to wit:

Paid ins. co. per voucher No. 1		$8 00
" S. P. Franklin,	" 2	7 12½
" Luke Richardson,	" 3	75
" G. Powell,	" 4	25
" Lewis D. Schnuden,	" 5	25
" H. Richey,	" 6	1 00
" J. Bogan,	" 7	2 75
" J. H. Eaton,	" 8	200 00
" Willett & Diggs,	" 9	1 50
And a commission of 10 per cent. on $70 is		7 00
Also reg'r wills' fees per voucher 10		12 37½
		$241 00
Overpaid		20 95
		$220 05

DISTRICT OF COLUMBIA,
Washington County, to wit:

JULY 29, 1843.

This day appeared French S. Evans, guardian aforesaid, and made oath on the Holy Evangels of Almighty God that the aforegoing account as stated is just and true; that he has bona fide paid, or secured
48 to be paid, the several sums for which he claims a credit, which is by the court allowed and passed.

Sworn before—

ED. N. ROACH.
Reg'r Wills.

EXHIBIT I.

The record (Exhibit I) is in the supreme court of the District of Columbia (law side). (Here insert it.) (See further on.)

EXHIBIT K.

Extract from Allison Nailor's deposition, taken in equity cause No. 3282. (*Divorce.*)

Q. Do you own any part of lot 2 in square 254, or have you ever owned any part of it?

A. No, sir.

Q. Did you ever collect the rents for any part of lot 2 in square 254?

A. Not for myself. I might have collected for the owner, and not as a general thing done that.

Q. Who is the owner?

A. Allison Nailor, junior.

Q. Did you give the property to him; and, if so, when?

A. He has the deed from John H. Goddard ever since—I couldn't tell how many years ago.

Q. Who paid Goddard for the property?

A. I think I did, sir; with his money.

Q. With whose money?

A. With my son's money.

Q. How old was he at that time, and where did he get the money?

A. I could not tell how old he was, sir. I could tell by reference to the date of his birth and the deed, neither of which I have with me. I

never had the deed at all. I don't suppose he stole the money. When he (was) young gold was very scarce, and as I would get a five-
49 dollar piece I would lay it by for his use. Four hundred dollars was the amount paid for it. I didn't deed it to him. It was never in my name, and I never exercised any acts of ownership over it.

Q. Then you paid for the house?

A. I think I did, sir, in the way I told you; but that was a great many years ago. I don't know how long.

Q. Your son wasn't of age at that time?

A. No, sir; he was not.

EXHIBIT L.

This is a deed from John H. Goddard to Allison Nailor, junior, of the west half of lot 2. in square 254. (Here insert it.) (This deed is given in full further on.)

50 EXHIBIT J.

Docket entries in the suit of John Doe, ex dem. W. A. Bradley vs. Allison Nailor.

March term, 1854, "appearances."

1854. March 15.—Ejectment nar., 2 copies.
" " " Service by sticking a copy on the premises.
Mo. for jud't.

October term, 1854, "imparlances."

1854. March 15.—Eject. nar., service.
1854. March.—Mo. for jud't.
1855. Feb'y 12th.—Judg't as casual ejector, east ½ lot 2, square 254.
Hab. facias possessionem.
No. 59, October, 1855.

October term, 1855, "judicials."

1855. June 11.—Hab. facias possessionem "countermanded."
Ren'd 29 March 1857.

March term, 1857, "judicials."

51 1856. Dec. 11.—Hab. facias possessionem. Possession given.
1857, May 19th.—Mo. to quash; cont'd under curia.
1860, Feb'y 28th.—Hab. fa. quashed and mo. to open original judg't and carried to 914, trials, Jan'y, 1860.

January term, 1860, "trials," 914.

1854, March 15.—Ejec't, nar., &c.
" Oct.—Judg't vs. casual ejector.
1857, March.—Mo. to quash ha. fa. pos.
1860, Jan'y.—Ha. fa. quashed.
" " .—Mo. to open orig'l judg't. (Con'd.)

May term, 1860, "trials," 462.

1854, March 15.—Ejectment, nar., &c., &c.,
1854, Octo.—Judg't vs. casual ejector.
1857, March.—Mo. to quash hab. fa. pos'ns.
1860, Jan'y.—Ha. fa. quashed by order of court.
" " .—Mo. to open original judg't. (Cont'd.)

October term, 1860, "trials," 288.

1854, March 15.—Ejec't nar., &c., &c..
52 1854, Octo.—Judg't vs. casual ejector.
1857, March.—Mo. to quash habe's possessioni.
1860, Jan'y.—Ha. fa. quashed by order of court.
" " .—Mo. to open original judg't. (Cont'd.)

January term, 1861, "trials," 222.

March 15, 1854.—Ejec't, nar., &c., &c.
1854, Octo.—Judg't vs. casual ejector.
1857, March.—Mo. to quash hab. poss'ni.
1860, Jan'y.—Habeas facias quashed by order of court.
" " .—Mo. to open original judg't. (Cont'd.)

May term, 1861, "trials" 186.

1854, March 15.—Ejec't nar., &c., &c.
1854, Octo.—Judg't vs. casual ejector.
1857, March.—Mo. to quash hab. fa.
1860, Jan'y.—Ha. fa. quashed by order of court.
" " .—Mo. to open orig'l judg't. (Cont'd.)

October term, 1861, "trials," 185.

1854, March 15.—Ejectment, nar. defence a title, not guilty, &c., &c.
1854, Octo.—Judg't vs. casual ejector, hab. facias issued.
53 1857, March.—Mo. to quash hab. fa.
1860, Jan'y.—Hab. fa. quashed by order of court.
1860, Jan'y.—Mo. to open original judg't. (Cont'd).

January term, 1862, "trials," 167.

1854, March 15.—Ejec't nar. service.
1854, Octo.—Judg't vs. casual ejector, and habere facias issued.
1857, March.—Mo. to quash hab. fa.
1860, Jan'y.—Hab. fa. quashed by order of court.
" " .—Mo. to open original judg't. (Stet docket.)

54 EXHIBIT L.

John H. Goddard to Allison Nailor, jr., deed in fee—Recorded 21st Dec'r, 1842.

Liber W. B., No. 98, fol. 236.

This indenture, made this sixth day of October, in the year of our

Lord one thousand eight hundred and forty-two, between John H. Goddard, of the city of Washington, in the District of Columbia, of the one part, and Allison Nailor, jr., of the same place, of the other part, witnesseth:

That the said John H. Goddard, for and in consideration of *of* the sum of four hundred and thirty dollars, current money of the United States, to him in hand paid, at or before the sealing and delivery of these presents, by the said Allison Nailor, jr., the receipt of which is hereby acknowledged, hath given, granted, bargained and sold, enfeoffed, conveyed, released, and confirmed, and by these presents doth give, grant, bargain, and sell, enfeoff, convey, release, and confirm unto the said Allison Nailor, jr., his heirs and assigns forever, all
55 that lot, piece, or parcel of ground situate lying and being in the city of Washington, and known and described on the plat or plan of the said city of Washington as being part of lot numbered two (2) in square numbered two hundred and fifty-four (254) and beginning for the said lot, piece, or parcel of ground on E street north, at the southwest corner of the said lot numbered two (2) in square numbered two hundred and fifty-four (254) and running thence north one hundred feet to an alley, thence east thirty feet, thence south one hundred feet to the said E street north, thence west with the line of the said E street north thirty feet to the place of beginning; being the same piece or parcel of ground that was conveyed to Catharine Colston by indenture of lease bearing date the sixth day of August, in the year one thousand eight hundred and thirty-five, by the said John H. Goddard, the said lease being assigned by the heirs of the said Catharine Coston to
56 Grafton Powell, and by said Powell to Allison Nailor, jr., the said piece or parcel of ground now being in the tenure and possession of the said Allison Nailor, jr. Together with the buildings, improvements, rights, privileges, appurtenances, and other hereditaments to the same belonging, or in any manner appertaining; and the remainders, reversions, rents, issues, and profits thereof, and all the right, title, and interest, and estate of him, the said John H. Goddard, in and to the same.

To have and to hold the said piece or parcel of ground and premises, with the appurtenances unto him, the said Allison Nailor, jr., his heirs and assigns, forever, to his and their sole use, benefit and behoof, forever.

And the said John H. Goddard, for himself, his heirs, executors and administrators, by these presents, covenants, promises and agrees to and with the said Allison Nailor, jr., his heirs and assigns, in
57 manner following, *following*, to wit:

That he, the said John H. Goddard, and his heirs, shall and will warrant and forever defend the said piece or parcel of ground and premises, with the appurtenances hereby bargained and sold unto him, the said Allison Nailor, jr., his heirs and assigns, from and against him, the said John H. Goddard, his heirs and assigns, and all persons claiming, or who may claim by, under, or through him, them, or any of them, and from and against all persons and claims whatsoever and whomsoever.

And further, that he, the said John H. Goddard and his heirs, shall and will at any and all times hereafter, at the request and cost of the said Allison Nailor, jr., his heirs and assigns, make and execute any and every other deed of assurance in law, for the more sure and effectual conveyance of the said piece or parcel of ground and premises, with the appurtenances, to the said Allison Nailor, jr., his heirs and as-

58 signs, that the said Allison Nailor, jr., his heirs or assigns, or his or her counsel, learned in the law, shall or may devise, advise or require.

In testimony whereof, the said John H. Goddard hath hereunto set his hand and affixed his seal the day and year first hereinbefore written.

JOHN H. GODDARD. [L. S.]

Signed, sealed, & delivered in the presence of—
B. K. MORSELL.
G. L. GIBERSON.

DISTRICT OF COLUMBIA,
Washington County, to wit:

Be it remembered, that on this sixth day of October, in the year one thousand eight hundred and forty-two, before the undersigned, two of the justices of the peace in and for the county of Washington, in the District of Columbia, personally appears John H. Goddard, party grantor within named, who acknowledges the within and foregoing instrument of writing to be his act and deed, and the piece or par-
59 cel of ground and premises with the appurtenances therein mentioned, to be the right and estate of the therein named grantee, Allison Nailor, jr., his heirs and assigns, forever.

And now at the same time, personally appears Anna E. Goddard, wife of the said John H. Goddard, who also makes her acknowledgment of the same. And she being by us privately examined apart from and out of the presence and hearing of her husband, whether she doth make her acknowledgment of the same willingly and freely, and without being induced thereto by fear or threats of, or ill usage by, her husband, or fear of his dipleasure, she acknowledges and declares that she doth make her acknowledgment of the same willingly and freely, and without being induced thereto by fear, threats of, or ill usage or by her husband, or fear of his displeasure.

Taken before and certified by—

B. K. MORSELL, *J. P.* [SEAL.]
G. L. GIBERSON, *J. P.* [SEAL.]

60 *Certificate to gen. term—Filed Ap.* 28, '77.

Supreme court of the District of Columbia.

RANDOLPH & WIFE, AND PENDLETON *vs.* JONES ET AL.	Nos. 11604, 11605, 11606, 11607. Consolidated.

The motion for a new trial in the above-entitled causes, consolidated, so far as said motion was made upon the minutes and addressed to the discretion of the court, having been entertained by the court and certified to the court in general term, to be heard in the first instance with the motion so far as based on the exceptions taken at the trial, it is thereupon ordered that the said motion so entertained stand continued until the same shall be heard and determined. The statement of the evidence as set forth in the bills of exceptions filed in the cause is hereby certified to the court in general term as setting forth all the evidence given at the trial.

Dated April 28, 1877.

61 *Appeal bond to gen. term.—Filed M'ch* 13, '77.

In the supreme court of the District of Columbia the 13th day of March, 1877.

RANDOLPH ET AL., PLAINTIFFS, *vs.* JONES ET AL. } 11604, 11605, 11606, 11607. Consolidated.

Allison Nailor, one of the defendants in the above causes, having appealed to the general term from the judgment pronounced herein on the 3d of March, 1877, in the circuit court, and Allison Nailor, jr., surety for said appeal, for themselves and each of them, their and each of their heirs and personal representatives, appearing and submitting to the jurisdiction of the said general term, hereby undertake to abide by, perform, and pay its judgment, which they agree may be pronounced against all of them.

ALLISON NAILOR. [L. S.]
A. NAILOR, JR. [L. S.]

Witness:
WM. G. HENDERSON.

Approved March 13, 1877.

D. K. CARTTER,
Ch'f Just.

61½ *General term proceedings*, 1878, *April* 15.

Proceedings before the supreme court of the District of Columbia in general term, commencing Monday, April 15, 1878.

Present, Chief Justice Cartter and Justices Humphreys and MacArthur.

62 *Decision of special term affirmed.—Filed June* 8, '78.

Supreme court of the District of Columbia in general term.

SATURDAY, *June* 8, 1878.

Session resumed pursuant to adjournment.

Present, Chief Justice Cartter and Justices Olin, Wylie, and MacArthur.

BEVERLY RANDOLPH & MARY B., HIS WIFE, pl'ffs, *vs.* RICHARD JONES, DEFENDANT. } At law. No. 11604.

and

BEVERLY RANDOLPH & MARY B., HIS WIFE, *vs.* ADAM SIMMS & ADAMS EHLSCHLAGER. } At law. No. 11605.

and

HENRIETTA PENDLETON, PLAINTIFF, *vs.* RICHARD JONES, DEFENDANT. } At law. No. 11606.

and

HENRIETTA PENDLETON, PLAINTIFF, *vs.* ADAM SIMMS & ADAMS EHLSCHLAGER, D'F'TS. } At law. No. 11607.

And now again come here as well the plaintiffs as the defendants in the above entitled causes, consolidated by order of the court on the 23d day of December, 1875, entered in the minutes of the circuit court, volume 11, page 177; and thereupon, because it appears to the court that there is no error in the record and proceedings of the circuit court in said consolidated causes; nor in the judgment of the court
63 therein, therefore it is considered that the judgment aforesaid be, and the same is, hereby affirmed, and that the defendants pay the costs of the causes to be taxed by the clerk, and that the plaintiffs have execution thereof. (3d minutes general term, p. 212.)

64 *Supersedeas bond.*

In the supreme court of the District of Columbia the 19th day of June, A. D. 1878.

BEVERLY RANDOLPH AND MARY B., HIS WIFE, plaintiffs, *vs.* RICHARD JONES, DEFENDANT. } At law. No. 11604.

Consolidated with—

SAME *vs.* ADAM SIMMS AND ADAMS EHLSHLAGER. } At law. No. 11605.

HENRIETTA PENDLETON *vs.* RICHARD JONES. } At law. No. 11606.

and

SAME *vs.* ADAM SIMMS AND ADAMS EHLSHLAGER. } At law. No. 11607.

Know all men by these presents that we, Allison Nailor and

65 Allison Nailor, junior, of the city of Washington, District of Columbia, are bound unto the above named Beverly Randolph, Mary B. Randolph, and Henrietta Pendleton, the above named plaintiffs, in the sum of fifteen hundred (1,500) dollars, to be paid to the said Beverly Randolph, Mary B. Randolph, and Henrietta Pendleton, their, his, or her executors and administrators, to which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this eighteenth day of June, A. D. eighteen hundred and seventy-eight.

Whereas the above-named Richard Jones, Adam Simms, and Adams Ehlshlager (and Allison Nailor, the defendant in interest, said Jones, Simms, and Ehlshlager being his tenants) have prosecuted a writ
66 of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled suits, consolidated by the said supreme court of the District of Columbia.

Now, therefore, the condition of this obligation is that if the above-named Richard Jones, Adam Simms, and Adams Ehlshlager (and Allison Nailor) shall prosecute their said writ to effect, and answer all damages and costs, if they shall fail to make good their plea, and all just damages for delay, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

ALLISON NAILOR. [SEAL.]
A. NAILOR. [SEAL.]

Signed and delivered in the presence of—
R. B. WASHINGTON, as to A. Nailor, jr.

The above bond is approved and is to act as a supersedeas bond.

MACARTHUR,
Justice Sup. C't, D. C.

Filed June 19, 1878.

67 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between Beverly Randolph, Mary B. Randolph, and Henrietta Pendleton, plaintiffs, and Richard Jones, Adam Simms, and Adams Ehlshlager, defendants (and Allison Nailor, the defendant in interest, said defendants being his tenants), the same being law cases Nos. 11604, 11605, 11606, 11607, consolidated, a manifest error hath happened, to the great damage of the said defendants as by their complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: Therefore, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 19th day of June, in the year of our Lord 1878, and of the Independence of the United States the 102d.

[SEAL.] R. J. MEIGS,
Clerk Supreme Court, District of Columbia.
By R. J. MEIGS, JR.,
Ass't cl'k Sup. C't D. C.
Clerk of the Supreme Court of the District of Columbia.

DISTRICT OF COLUMBIA, *to wit:*

To Beverly Randolph, Mary B. Randolph, and Henrietta Pendleton:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Richard Jones, Adam Simms, and Adams Ehlshlager (and Allison Nailor) are plaintiff's in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness Arthur MacArthur, justice of the said supreme court of the District of Columbia.

ARTHUR MACARTHUR,
Justice Sup. C't, D. C.

Service of citation acknowledged this 11th day of July, 1878.
JOHN SELDEN,
Att'y for def'ts in error.

(Indorsed:) No. 11604–5–6 & 7. Jones & al. vs. Randolph & al. Writ of error. Filed Jun. 19, 1878. R. J. Meigs, clerk.

68 AUTHENTICATION OF RECORD.

Clerk's certificate.

CLERK'S OFFICE,
Supreme Court of the District of Columbia:

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 10th day of October, 1878.

[SEAL.] R. J. MEIGS, *Clerk,*
By M. A. CLANCY, *Assistant Clerk.*

Justice's certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 10th day of Oct., 1878.

[SEAL.] D. K. CARTTER *Chief Justice.*

Clerk's certificate to justice's official character.

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 10th day of October, 1878.

[SEAL.]

R. J. MEIGS, *Clerk*,
By M. A. CLANCY, *Assistant Clerk.*

(Indorsement on cover:) No. 255. Richard Jones et al., plaintiffs in error, vs. Beverly Randolph et al. Dist. of Columbia sup. court. Filed 12th October, 1878.

Clerk's certificate to justice's official character.

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 10th day of October, 1878.

[SEAL.] R. J. MEIGS, *Clerk*,
By M. A. CLANCY, *Assistant Clerk.*

(Indorsement on cover:) No. 255. Richard Jones et al., plaintiffs in error, vs. Beverly Randolph et al. Dist. of Columbia sup. court. Filed 12th October, 1878.

C

SUPREME COURT U. S.
FILED
MAR 21 1881
JAMES H. McKENNEY, Clerk.

UNITED STATES SUPREME COURT.

No. 255.

RICHARD JONES ET AL., *Plaintiffs in Error,*

vs.

BEVERLY RANDOLPH ET AL.

BRIEF FOR PLAINTIFFS IN ERROR.

W. D. DAVIDGE,
R. B. WASHINGTON,
for Plaintiffs in Error.

R. O. POLKINHORN, PR., 622 AND 624 D STREET, WASHINGTON, D. C.

UNITED STATES SUPREME COURT.

No. 255.

RICHARD JONES ET AL., *Plaintiffs in Error*,

vs.

BEVERLY RANDOLPH ET AL.

Statement of the Case.

In 1873 Beverly Randolph and Mary B. Randolph, his wife, and Henrietta Pendleton, the plaintiffs below, commenced four actions of ejectment to recover the east half of lot two in square two hundred and fifty-four, in the city of Washington.

The property sued for fronts on E street, near the National Theatre, and is improved by two brick houses.

Pleas were filed by the defendants below, and issue joined thereon.

(Record, pp. 1–5.)

It was then agreed that the cases should be consolidated and tried as one, and that Allison Nailor, who was in possession of the property, (the defendants below being his tenants) should be made a party defendant. (R., p. 6.)

The case was tried and a verdict and judgment rendered for the plaintiffs below. (R., p. 7.) The judgment was affirmed in General Term. (R., p. 27.)

The case comes to this court upon a writ of error.

In the year 1820 William O'Neale, being the owner in fee-simple of the property in controversy, executed a deed to William A. Bradley, cashier of the Bank of Washington.

The deed contains the following recitals:

"*Whereas*, John B. Timberlake is endorser on a note for $1,980, drawn by the said William O'Neale, which note is discounted in the Bank of Washington for the use and benefit of the said William O'Neale, and the said John B. Timberlake agrees to renew the said endorsement from time to time until the said note shall be paid if desired so to do.

"*Now, therefore*, In consideration of the aforesaid agreement on the part of the said John B. Timberlake, and of the sum of one dollar in hand paid by the said William A. Bradley to the said William O'Neale, at or before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, the said William O'Neale hath granted, bargained, sold, aliened, and conveyed, and by these presents doth grant, bargain, sell, alien, and convey unto the said William A. Bradley and his successor, as cashier of the Bank of Washington aforesaid, all that certain piece or parcel of ground." [Here follows the description of the property.] "To have and to hold the premises aforesaid, with the appurtenances, unto him, the said William A. Bradley and his successor, in trust, nevertheless, to and for the following uses, intents, and purposes, that is to say: That if the said William O'Neale shall fail to pay the said note, or any note or notes which may be given for the renewal of the same, when the same shall become due, or any part thereof, that then and in such case the said William A. Bradley or his said successor shall, and are hereby authorized and empowered, to enter upon and take possession of the premises aforesaid, and to sell the same at pub-

lic or private sale for cash or on credit, as he may think best." * * * * * "And the said William O'Neale doth hereby fully authorize and empower the said William A. Bradley or his said successor to enter upon and take possession of the aforesaid described premises, and to convey the same to the purchaser or purchasers."

In 1837 William O'Neale died in possession of the property, leaving a will and a codicil thereto, whereby he devised the property to his widow, Rhoda O'Neale, for life, with remainder to Mary B. Randolph and Henrietta Pendleton, the plaintiffs below, in fee simple, and he also devised a part of his estate, but not the property in controversy, to Margaret R. Timberlake, in remainder, after the death of said widow. R., pp. 14–16.

On the 31st of December, 1839, there was due upon the note referred to in the deed of trust, and held by the Bank of Washington, $1,072.41, and on that day French S. Evans, who was the guardian of said Margaret R. Timberlake, paid to the bank the amount due on the note, and the bank assigned and delivered the note and other papers to the guardian, and ordered tha transfer to the guardian of the rignt of the bank to the deed of trust. (R. p. 10.) The money paid by Evans, the guardian, belonged to his ward, and was paid under instructions from Gen. Eaton, who had married the widow of John B. Timberlake.

The guardian settled his first, second and final accounts in the Orphan's Court, respectively, January 8th, 1841, January 11th, 1842, and July 29th, 1843. (R., p. 12.)

On July 29th, 1843, the day he filed his final account as guardian, he also filed the note and the papers given to him by the bank in the Orphan's Court. (R. p. 11–12.) The guardian collected rents from the property in controversy. He accounted with the Orphan's Court for the money which

was paid to the bank, and for *all* rents and profits received from the property. (R. p. 12.)

The accounts of the guardian with the Orphan's Court are set forth in the record at pages 18 to 21, and they show the gross amount of rent received by him to be $560.25. After the settlement in the Orphan's Court he had nothing to do with the property. But he testifies that "*he heard it was sold.*" (R. p. 12.)

On the 25th of August, 1845, James Adams, who was then the cashier of the Bank of Washington and the successor of said Bradley as cashier, advertised for sale in the National intelligencer the property deecribed in the deed of trust. (See copy of the advertisement at page 18 of Record.")

Pursuant to the advertisement the property was put up for sale ahd Allison Nailor became the purchaser· Adams the cashier of the Bank was present at the sale. (R. pp. 10–11.

After the property was struck off to Nailor by the auctioneer, the cash required was paid to him by Nailor. (R., pp. 10, 11.)

Nailor immediately took possession of the property and rebuilt the houses, which had been burnt down, at a cost of from $5000 to $6000, and since the Fall of 1845, Nailor has held the open, exclusive, and adverse possession, claiming title to the same as absolute owner. (R. pp. 10–11.)

All the evidence adduced at the trial is set forth in the statement of the evidence. (R. pp.9–12.)

This fact is specifically stated at the foot of page 12.

The evidence being closed, the plaintiffs below asked the Court to grant prayers, numbered one and three, (R. pp. 12–13,) which was done; and to the granting of each prayer the defendants below, at the time, duly excepted.

The defendants below thereupon offered a prayer, (R., p. 13,) which the Court refused to grant, to which ruling the defendants at the time duly excepted. (R. p. 14.)

Thereupon the Court modified the pra y erof the defendants below, and instructed the Jury accordingly, to which modification the defendants at the time excepted. (R. p. 14.)

Assignment of Errors.

The court erred in the first bill of exceptions, in assuming that there was evidence that Evans, the guardian, collected rents of the property with the consent of Rhoda O'Neale, and applied them, with such consent, to the note until it was fully paid, as set forth in plaintiffs' prayer, No. 1 (R., pp. 12, 13); whereas there was no evidence adduced at the trial tending to show that rents were collected with the consent of Rhoda O'Neale, or that any rents whatever were applied in payment of the note.

2. The court erred in instructing the jury, as matter of law, that if they find the facts set forth in plaintiffs' prayer, No. 1, then the note became extinguished and no valid sale could be made under the deed of trust in the year 1845.

3. The Court erred in assuming the facts that the note might have been paid prior to 1845 out of the proceeds or income of the estate of William O'Neale, under the direction or consent of his widow, as set forth in plaintiffs' prayer No. 3 (R. p. 13); whereas there was no evidence whatever tending to prove these facts.

4. The court erred in instructing the jury that the deed of trust became extinguished if the note was paid on or before July 29, 1843, or at any time prior to 1845, out of the proceeds or income of the estate of O'Neale, as set forth in plaintiffs' prayer No. 3.

5. The court erred in instructing the jury that during the lifetime of Rhoda O'Neale no adverse possession after such payment of the note could arise in respect to the property in question as against the children of Mary B. Randolph, as set forth in plaintiffs' prayer, No. 3.

6. The court erred in instructing the jury that such children had, by law, twenty years from the death of Rhoda O'Neale in which to sue for the recovery of the property from any person or persons who acquired possession thereof after the payment of the note and in the lifetime of said Rhoda O'Neale, as set forth in plaintiffs' prayer, No. 3.

7. The court erred in the second bill of exceptions in refusing the prayer of the defendants below. (R., p. 14.)

8. The court erred in the third bill of exceptions in modifying the defendants' prayer, and in instructing the jury that to bar the plaintiffs' title they must find that Nailor "complied with the terms of sale by the payment of the purchase-money."

Argument.

I.

The first prayer of the plaintiffs below was calculated to mislead the jury.

It instructs the jury, among other things, that if they should find that Evans applied the collections made by him to the note until the same was paid, then, as matter of law, the note, on or before the year 1843, became extinguished, and no valid sale could be made under the deed of trust in 1845.

Now, there is not one word in the evidence *tending* to show that Evans applied the collections to the payment of the note. The full amount of the collections, as appears

by his accounts, amounted to $560.25, (R., pp. 18–21,) and the balance due on the note to $1,072.41, without accrued interest. (R., p. 10.)

Also, there is not one word of evidence tending to show that any rents were collected or applied *with the consent of Rhoda O'Neale*, as is assumed by the prayer.

In *Michigan Bank* vs. *Eldred*, (9 Wall., 553,) the court say:

"It is clearly error in a court to charge the jury upon a supposed or conjectural state of facts, of which no evidence has been offered. Such an instruction supposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the charge of the court, and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to a correct conclusion, but its tendency is to embarrass and mislead, and may induce them to indulge in conjectures instead of weighing the testimony."

See, also, 20 How., 252.

II.

Prayer No. 1 concludes with the proposition, that if the facts stated therein are found by the jury, then, *as matter of law*, the note, on or before the 29th of July, 1843, became extinguished—and no valid sale could be made of the property in question under the deed of trust in 1845.

1. Even if the note in the hands of Evans as guardian had been paid by the collections of rent, yet if, after payment but before maturity, it had passed into the hands of an innocent purchaser without notice, the purchaser's right to it and his right to the security accompanying it, would have been unassailable, and there is no evidence whatever to show

that the note, which had been renewed from time to time, through a series of years, had matured at the time of payment. (R., p. 9.) It was then clearly error to charge the jury that the payment of the note operated as an extinguishment of it and defeated any sale under the deed of trust.

2. Even assuming all the facts set forth in the prayer to be true, yet if the trustee, under the deed of trust, sold the property to Allison Nailor in 1845 without notice to him of the extinguishment of the debt, and he paid the purchase money, or any part thereof, he would be protected in his purchase.

The deed of trust gives transcendent power to the trustee to sell at his pleasure.

The deed of trust is in effect a mortgage with power of sale. *But it contains no condition that the estate conveyed shall cease and determine upon payment of the debt.* It is formally acknowledged and was recorded, as appears by the recital in the advertisement (R., p. 18), and the advertisement operated as a constructive notice of the sale to those claiming under the mortgagor.

If the mortgage debt was paid, *the legal title did not become thereby released*, (*Peltz* vs. *Clarke*, 5 Pet., 481), and an innocent purchaser, without notice of payment, would acquire a valid title.

Jones on Mortgages (2d Ed.,) Sect. 1,898.

The leading case on this subject is *Warner* vs. *Blakeman*, 38 Barb. (N. Y.), 501, affirmed in 4 Keyes (N. Y.), 487. After reviewing the authorities and overruling *dicta* in previous cases, the court say (p. 518):

"It follows that notwithstanding the mortgage has been, in fact, paid, the mortgagor having due notice of the foreclosure, cannot afterwards upset the title of a *bona fide*

purchaser at the sale by proving payment of the mortgage debt."

The statutory provisions referred to in the decision do not affect the general doctrine laid down.

This action was not commenced until more than twenty-eight years after sale and entry. A legal conveyance to Nailor by the trustee will *be presumed* after such a lapse of time.

A valid title will pass by a sale of mortgaged premises, by an assignee of the mortgage to a *bona fide* purchaser without notice, under and in pursuance of the provisions of a power of sale contained in the mortgage, *although payment of the mortgage debt has been tendered to such assignee*, if not immediately followed by a suit to redeem

Montague vs. *Dawes*, 12 Allen, (Mass.), 397;
See *Hunt* vs. *Russell*, 56 N. H., 559.

3. The case is a plain one. On December 31, 1839, the bank assigned the note, with the benefit of the security created by the deed of trust, to Evans, as guardian of Margaret R. Timberlake. (R., p. 10.) On July 29, 1843, Evans, as guardian, settled his final account in the Orphan's Court. His trust then ceased, and he was discharged. At the time he settled his final account, Evans also filed in the Orphan's Court the note and papers he had received from the bank. After the transfer of the note to Evans, as guardian, he collected rents from the property in controversy. He accounted to the Orphan's Court for all these rents and profits, and they are set forth in his accounts. (R., pp. 11, 12.)

The accounts were produced and identified by Evans, and are made part of the evidence. (R., p. 12.)

They are set forth in the record at pages 18–21.

These accounts show that Evans received on account of

that the note, which had been renewed from time to time, through a series of years, had matured at the time of payment. (R., p. 9.) It was then clearly error to charge the jury that the payment of the note operated as an extinguishment of it and defeated any sale under the deed of trust.

2. Even assuming all the facts set forth in the prayer to be true, yet if the trustee, under the deed of trust, sold the property to Allison Nailor in 1845 without notice to him of the extinguishment of the debt, and he paid the purchase money, or any part thereof, he would be protected in his purchase.

The deed of trust gives transcendent power to the trustee to sell at his pleasure.

The deed of trust is in effect a mortgage with power of sale. *But it contains no condition that the estate conveyed shall cease and determine upon payment of the debt.* It is formally acknowledged and was recorded, as appears by the recital in the advertisement (R., p. 18), and the advertisement operated as a constructive notice of the sale to those claiming under the mortgagor.

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The accounts were produced and identified by Evans, and are made part of the evidence. (R., p. 12.)

They are set forth in the record at pages 18–21.

These accounts show that Evans received on account of

rents only the sum of $560.25, not more than half enough to satisfy the principal due on the note without accrued interest, even if he had applied the rents for that purpose. The counsel for defendants in error states in his brief that the amount collected was between $500 and $600.

There was no evidence whatever to show that Evans collected the rents with the consent of Rhoda O'Neale or that he applied any part of the rents collected to the payment of the note,

Now, it is submitted that in view of these facts, it was error to incorporate in the first prayer the following language.

"If the jury further find that thereafter and between the said 31st of December, 1839, and the 29th of July, 1843, the said Evans as guardian aforesaid, of the rents and profits of the estate so as aforesaid disposed of by the said last will and testament, and with the consent of the said Rhoda O'Neale, made collections from time to time and applied them to the said note until the same, both as to principal and interest, was fully paid, and that on the said 29th day of July, 1843, the said Evans, in the Orphans' Court of this District, closed his account as such guardian, then the jury are instructed, as matter of law, that the said note, on or before the 29th of July, 1843, became extinguished, and that no valid sale could be made of the property in question under the said deed of trust in the year 1845."

When Evans closed his trust as guardian, and deposited the ward's securities in the Orphans' Court, the presumption is that the property was handed over to the ward, and that the ward instructed James Adams, the cashier of the Bank of Washington, to foreclose the deed of trust to satisfy the balance due on the note.

As these transactions, however, occurred about thirty

years before the commencement of this suit, the evidence of them is lost in the mists of time.

It is to be borne in mind that *more than twenty-eight years elapsed* from the time of the purchase by Nailor and the commencement of this suit.

The Bank of Washington has been one of our leading moneyed institutions almost from the birth of the city. Is it reasonable to suppose that the cashier of that institution would proceed to collect a debt under a deed of trust unless he had convincing proof that the debt was due and unpaid ?

If the note had been satisfied by the payment of the rents, why was it not surrendered to the parties entitled thereto? The executors under the will should then have become its custodian.

III, IV.

The objections to granting prayer No. 1, apply in a large degree to prayer No. 3.

1. There is no evidence tending to show that the note was paid out of the proceeds or income of the estate of William O'Neale under the direction or consent of his widow, or in any other way, and even if it had been, the deed of trust did not become thereby extinguished.

2. *The legal title still remained in the trustee under the deed of trust;* and if he had proceeded after the payment of the note to advertise and sell the property, an innocent purchaser for value would have been protected. (See cases cited above.) A deed from the trustee to the purchaser is to be presumed after the lapse of 28 years.

3. If the note had been paid before maturity and had then passed into the hands of an innocent purchaser for value

without knowledge or notice of the payment, he would have been protected in his title with power to compel the trustee to sell under the deed of trust to satisfy the note; and we have no reason to believe from the evidence that the note was past due at the time it was assigned by the bank or at the time it was filed in the Orphan's Court. The note had gone on by renewals from time to time for twenty years, and whether the last renewal had expired or not we do not know.

V, VI.

If the deed of trust was not extinguished by the payment of the note, a sale under it could inaugurate an adverse possession against the plaintiffs below, and the second and third clauses of prayer No 3 contain error.

VII.

It was error to refuse the prayer of the defendants below. (R., p. 14.)

The property was struck off to Nailor, and he thereupon entered into possession *claiming title*, and subsequently improved the property and held the open and adverse possession for twenty years. (R., pp. 10, 11.) If, then, *the deed of trust was in force* when the property was struck off these facts alone gave title to Nailor. He entered under *color of title*, and not as an agent or trustee or tenant of the person holding the legal title; and the statute began to run in his favor against the legal title vested in the cashier of the bank. Whether Nailor complied with the terms of sale or not is wholly immaterial.

To give color of title, a written conveyance is not required. An entry is by color of title when it is made under a *bona fide* claim to a title existing in another.

McCall vs. *Neely*, 3 Watts, (Penna.,) 72.

An entry is an ouster or not according to the intent with

which it was done. If made *under color of right*, it is an *ouster*.

Ewing vs. *Burnet*, 11 Pet., 41.

Adverse possession in the defendant for twenty years is evidence of title in the possessor, and constitutes a good defence to the action of ejectment.

1 Chitty Pl. (16th Am. ed.), 213;
Hammond vs. *Ridgely*, 5 Harr. & John., 151;
Jackson vs. *Brink*, 5 Cow., 480.

In *Hogan* vs. *Kurtz* (4th Otto, 776), Mr. Justice CLIFFORD, delivering the opinion of the court, says:

"Adverse possession under a claim of right uninterrupted, open, visible and notorious may be set up in such an action as a defence."

94 U. S. Sup. Ct. R., 776.

The words "open and adverse," in the defendants, prayer, necessarily involve the idea of the *continuous* possession of Nailor for the period of limitation, and the *evidence* shows that ever since 1845 he has held "the open, *exclusive*, and adverse possession," claiming title as *absolute owner*. (R., p. 11.)

VIII.

It was clearly error to modify the prayer of the defendants below by instructing the jury that to bar the plaintiffs' title they must find that Nailor "complied with the terms of sale by the payment of the purchase-money."

1. The power of Adams, the cashier, to sell under the deed of trust was very extensive. He had power to enter upon and take possession of the premises, *and to sell the same at public or private sale for cash or on credit*. (R., p. 17.) It was not then required of Adams to sell, or of Nailor to buy,

pursuant to the terms of sale as advertised. After the sale, if Adams chose to vary the terms, he had a right to do so.

Phillips and Nailor testify that the cash payment was made, and Nailor thinks three notes were given for the deferred payments, for $400 each, with John Hands as endorser. If Adams was satisfied with the notes and the endorsement, there was no reason why he should not waive the *security of a deed of trust on the property*, and if Adams accepted the notes and the endorsements, it was wholly immaterial whether Nailor or the endorser subsequently paid them or not. They were accepted in satisfaction of the sale.

2. As soon as the property was struck off to Nailor, the cash payment required from him made, and he entered into possession of the property, it became an *absolute sale*, not an *executory contract of sale*. If credit was given for any portion of the purchase money, the sale was none the less absolute. The possession became adverse, and the failure of Nailor subsequently to comply with the terms of sale by the payment of the purchase money did not prevent the statute of limitations from running in his favor. He became a purchaser. The title passed as effectively as if he had bought a chattel on credit, accompanied with delivery of possession.

When the auctioneer knocks the property down to the purchaser the contract of sale is complete.

1 Parsons on Contracts, (5th Ed.) 496;
2 Kent Com, 540.

"It is now settled (in auction sales) that the purchaser from the time of the purchase is in equity *owner of the estate*, that he must pay the consideration money notwithstanding the estate itself should be injured or completely destroyed by fire or otherwise between the time of the contract and the conveyance."

Babington on Auctions, p. 125.

When the property was struck off the trustee must have regarded the sale as complete, for he says in the advertisement: The trustee reserves the privilege of selling the property at the risk and expense of the purchaser if the terms are not complied with in three days."

In *Sumner* v. *Stevens*, 6 Met. (Mass.) 338, Chief-Justice SHAW says:

"A grant, *sale* or gift of land *by parol* is void by the statute; but when accompanied by an actual entry and possession it manifests the intent of the donee to enter and take as owner and not as tenant, and it equally proves an admission on the part of the donor that the possession is so taken. Such a possession is adverse. It would be the same if the grantee should enter under a deed not executed conformably to the statute, but which the parties, by mistake, believe good. The possession of such grantee or donee cannot in strictness be said to be held in subordination to the title of the legal owner, but the possession is taken by the donee as owner, and because he claims to be owner; and the grantor or donor admits that he is owner, and yields the possession because he is owner. He may reclaim and re-assert his title because he has not conveyed his estate according to law, and thus regain the possession, but until he does this by entry or action the possession is adverse. Such adverse possession continued twenty years takes away the owner's right of entry.

See also the *South School District* v. *Blakeslee*, 13 Conn., 227.

Barker v. *Salmon*, 2 Met. (Mass.), 32.

In *Moore* v. *Webb*, 2 B. Mon. (Ky.), 282, it is held that an adverse possession may commence where the entry is under an *executory* agreement.

See *Blight's Lessee* vs. *Rochester*, 7 Wheat., 535, 548;

The Society vs. *Town of Paulet*, 4 Pet., 506;
Watkins vs. *Holman*, 16 Pet., 24;
Jackson vs. *Huntington*, 5 Pet., 403;
Croxall vs. *Shererd*, 5 Wall., 268, 287.

3. The instruction of the court is so sweeping that if Nailor had strictly complied with the terms of sale as advertised by paying one-fourth of the purchase-money in cash, and by giving his notes for the balance secured by a deed of trust on the property, yet an adverse possession could not have originated in his favor. *The full amount of the purchase money must have been paid.*

4. An effort was made at the trial to impeach the testimony of Nailor by showing that in a suit brought by his wife for divorce *amensa et thoro* and alimony, he had testified that he had not collected the rents of any part of lot 2 in square 254, for himself, and that Allison Nailor, Jr., was the owner. (R., pp. 21, 22.) (R., p. 12.)

The property that Nailor had reference to in his deposition was the *west* half of lot 2 in square 254, which was then owned by his son.

That Nailor had reference to the *west* half of the lot, and not to the property in controversy, is made evident from an examination of the deposition. (Exhibit K, R. pp. 21, 22.)

The witness says that Allison Nailor, Jr., has the deed from John H. Goddard, and the witness paid Goddard the purchase-money. The deed from Goddard is set forth in the record, (pages 23, 25), and it describes the *west* half of lot 2 in square 254, and embraces *no part* of the *east* half.

Nailor testifies that when examined in the divorce suit he supposed the enquiry had reference to the Goddard property. The record states that the Goddard deed is for the *west* half of the lot. (Ex. L, R. p. 22.)

All of which is respectfully submitted.

W. D. DAVIDGE,
R. B. WASHINGTON,
For Plaintiffs in Error.

OFFICE SUPREME COURT U. S.
FILED
JAN 27 1881
JAMES H. McKENNEY, Clerk.

UNITED STATES SUPREME COURT.

October Term, 1880.

RICHARD JONES, ET ALS.,
Plaintiffs in Error,
vs.
BEVERLY RANDOLPH, ET ALS.,
Defendants in Error.

No. 255.

Brief of Defendants in Error.

JOHN SELDEN,
Counsel for defendants in error.

R. O. Polkinhorn, Printer.

UNITED STATES SUPREME COURT.

October Term, 1880.

RICHARD JONES, ET ALS.,
Plaintiffs in Error,
vs.
BEVERLY RANDOLPH, ET ALS.,
Defendants in Error.
No. 255.

Brief of Defendants in Error.

STATEMENT OF THE CASES.

These cases were ejectments, brought in the Supreme Court of the District of Columbia, by tenants in common, for two tenements in the possession of different occupants holding under the same landlord. The landlord, and another through whom he claimed, voluntarily became parties defendant, and the actions were consolidated and tried as a single suit. (*Rec.* 6.)

William O'Neale died seised and in possession of the premises, on October 24, 1837. (*Id.* 9.)

By a general provision in his will, he had, in the same year, devised to his wife *Rhoda*, during her life, "all the proceeds and income" of his estate, requiring only that after paying his "debts and funeral expenses" she should keep down taxes upon the property. (*Id.*, 15.)

By a codicil to this will, he had confirmed to his wife a life estate in the houses now in controversy, with remainder over to the children of his daughter *Mary B. Randolph*, as tenants in common. (*Id.*, 16.)

The only children of this daughter, were the Mrs. *Randolph* and Mrs. *Pendleton* who were plaintiffs in the ejectments below. (*Id*, 9.)

The former was born in 1825, and married in 1847, and is still under coverture. The latter was born in 1827, and married in 1847, and became a widow in March, 1873 (*Id.*, *9.*), about eight months before the institution of the suits below.

Rhoda, the widow of the testator, died on the 6th of April, 1860. (*Id.*, 9.) She had been a grandmother, certainly, as early as 1825. And, at the time of her death, was, no doubt, both aged and infirm.

Many years before the execution of his will, and on November 11, 1820, *O'Neale*, in order to secure one *John B. Timberlake*, as indorser on a note, (or any renewals thereof,) of the former, for $1,980, discounted at the Bank of Washington, had executed a deed of trust upon the premises in controversy.

This conveyance was made unto one *Bradley* "*and his successor as cashier*" of the discounting Bank, with *habendum* to the like effect, the power of entry, sale and conveyance, provided in case of default, being also given unto said *Bradley*, "*or his said successor.*" (*Rec.*, 16–17.)

After certain renewals of this note down to October 28, 1828, and subsequent payments on the last renewal, by *O'Neale*, in his lifetime, the balance due to the Bank, as holder, remained, on December 31, 1839, the sum of $1,-072.41. (*Id.*, 10.)

Timberlake, the indorser, had intermarried with a daughter of the maker (*Id.*, 9), and this daughter, upon the death of her husband in 1828 (*Id.*, 10), had, during the next year (*Id.*, 9), intermarried with *Gen'l Eaton* (*Id.*, 9. 11), afterwards one of the executors named in the will of her father.

From this alliance with *Timberlake* had been born a daughter—*Margaret R.* (*Id.* 10), who afterwards, as one of the children of the then Mrs. *Eaton*, became interested as devisee in remainder, after a life estate to *Rhoda*, in a third part (the property now in controversy excepted,) of the estate of *William O'Neale* (*Rec.* 15–16).

Of Miss *Timberlake* one *Evans* had been appointed guardian (Id. 11).

And while the last renewal of the note previously mentioned, was still held by the bank, *Eaton*, then in Spain, as our minister, wrote to *Evans*, as such guardian, and instructed him "to pay the balance of the note," out of moneys belonging to his ward (*Id.*, *Ib.*)

Evans, accordingly, on December 31, 1839, paid to the Bank, the said balance of $1,072.41, then due upon the note, (*Id.*, *Ib.*) and received from the president of the bank both the note itself and an assignment of the interest of the bank in the collateral security. (*Rec.*, 10–11, 17–18).

Subsequently, *Evans*, as guardian, collected the rents of the property, and accounted for them to the proper court. (*Rec.*, 11.)

His accounts, as to these rents, extended over a period of about 3 years and 7 months,—from January 1, 1840, to July 29, 1843. (*Id.*, 18–20.)

The houses (*Id.*, 10–16) appear to have rented for $12.50 each, per month. (*Id.*, 18–20.)

There was no evidence to show that *Evans*, though thus in the perception of the rents and profits, had been either diligent or particular in the management of the property. His collections of rent appeared, on the contrary, to have been made with much irregularity, and to have amounted, according to his accounts, in the aggregate, to scarcely more than between $500 and $600. (*Id.*, 18–21.)

But that the beneficial use and income of the property, however improvidently administered, had been regarded as satisfaction of the note, seemed strongly implied from the evidence that while credit had been claimed by the guardian for the money paid on obtaining the transfer of the paper from the bank (*Id.*, 19), the note itself had not only never been charged against him, nor delivered to his ward, but, upon the final settlement of his accounts in July, 1843, had been with other papers, filed by the guardian in the orphan's court (*Id.*, 11), whence it did not appear to have been ever afterwards sought or withdrawn.

Bradley ceased to be cashier of the Bank, in 1827, (*Id.*, 10,) and died in 1867. (*Id.*, 11.)

He had been succeeded by one *Adams*, who had remained in office until 1870, (*Id.*, 10,) but, at the time of the trial, had become, through age and infirmity, incompetent to testify. (*Id.*, 11.)

On March 5, 1845, the two houses devised by the testa-

tor, had been partially destroyed by fire, the walls only being left standing.

On August 25, 1845, *Adams*, as "cashier," advertised, under color of the deed to *Bradley* "and his successor," a sale of the lot, with the "*two two-storied brick houses*," to take place on *Saturday*, the *20th* of September thereafter. (*Id.*, 10. 18.)

No default in payment of the note was recited in the advertisement. (*Id.*, 18.)

Two days thereafter, and on *Monday*, the 22nd of September, the same advertisement was again published, announcing that the "above sale" had been "postponed until Saturday, the 4th of October, ensuing."

The "printer's mark" at the foot, indicated that this new advertisement was to be published *three times* before the day of sale. (*Id.*, 10.)

It was, in fact, published only on September 22.

The terms of sale, as advertised, were one-fourth cash, and the balance in equal installments at 4, 8 and 12 months, evidenced by notes, bearing interest, and secured *by deed of trust upon the property*. (*Id.*, 18.)

There was evidence tending to show that one *Nailor*, under whose title the case was defendant below, had seen the advertisement of the property, and attended the sale; that the property had been knocked down to him for "$1600, and, perhaps, a fraction over;" that under the direction of *Adams*, "the cash required," had been handed to the auctioneer; that for the balance of the purchase money, "three notes for $400 each," "with *John Hands*, as endorser," had been given; that these notes had been paid before maturity; that *Adams* had promised to give

Nailor a deed for the property; and that the latter, after the sale, had at once entered into possession and rebuilt the tenements, at a cost of from $5,000 to $6,000, and had since held open and exclusive possession of the premises, under claim of title, as owner. *Id.*, 10–11.

It was shown, on the other hand, that on December 8, 1847, as well as on May 26, 1851, *Nailor*, had bought in this same property, on sale for taxes in the name of *O'Neale*, that on February 6, 1860, a son of *Nailor* with the consent of his father, had likewise obtained a deed for the premises, from one *Alexander*, who had purchased them at tax sale on May 27, 1857, (*Id.*, 12); and that so late as April 10, 1875, *Nailor* had, on oath, deposed that he had never been the owner, or collected, for himself, the rents, of any portion of this property. (*Id.*, 12. 21.)

It was also shown that on March 15, 1854, *Bradley* had sued *Nailor* in ejectment for the land in question; that, on February 12, 1855, after service of the declaration by sticking a copy on the premises, judgment had been rendered against *Nailor*, as casual ejector; and that under this judgment, and on December 11, 1856, there had been "possession given" of the premises, upon writ of *habere facias*, though, as it appeared, more than three years afterwards, on February 28, 1860, this writ had been quashed. (*Id.*, 22.)

The motion on which the writ was thus quashed, had been made as early as May 19, 1857 (*Id.*, 22), and by counsel employed by *Nailor*. (*Id.*, 12.)

On the same day on which the *habere facias* was set aside, there had been filed a motion to open the judgment. This motion, after various continuances, had, in 1862, been

placed on the *stet* docket, (*Id.*, 23) where, so far as appeared at the trial now under review, it still remained.

The jury found for the plaintiffs. And the case is here on certain bills of exceptions taken by the defendants and which purport to contain "all the evidence given in the causes," (*Id.*, 12,) at the trial.

Points and Authorities.

Under the will of *O'Neale*, viewed as a conveyance of the legal title, the rights of the plaintiffs below must have been unaffected, of course, by any possession, on the part of *Nailor*, between the year 1845 and the institution of these suits in 1873.

From the death of the testator, in 1837, until her own decease in 1860, there would have been an outstanding freehold in *Rhoda*, his widow. The right of entry would have accrued to the devisees in remainder, and limitation could have commenced to run against them, only from this latter date.

Yet, as at the time their right of entry first accrued, both of the plaintiffs below were under coverture, limitation, as to one of them, whose husband is still living, would never have begun to run; and as to the other, who became a widow in March, 1873, could have run less than a year before action brought.

The effort of the defense below, was to establish an outstanding legal title, in 1845, under the conveyance in trust made to *Bradley* "and his successor, as cashier," in 1820, and, by applying the bar of the statute to this legal estate, to apply it, at the same time, to the title of the plaintiffs below, as equitable devisees under the will.

To defeat the interposition of this technical legal estate, was the object of the first as well as of the third of the prayers asked by the plaintiffs below. (*Rec.*,12–13.)

From the allowance of these prayers arises the

First Bill of Exceptions.

The exception to these instructions was "*to the giving the same or either of them.*" (*Rec.*, 13.)

And it follows, that if either of the instructions was correct, the exception cannot be sustained.

The first instruction was, in effect, that if *Evans*, after taking up the note at the bank, on December 31, 1839, had, with the consent of *Rhoda O'Neale*, and between that date and July 29, 1843, collected the rents and profits of the property, and applied them in full payment of the note, the deed of trust became, by such payment, extinguished, and no valid sale thereunder could be made of the property, in the year 1845.

As there was no power in the holder of the note, as such, to enforce its payment by appropriating the rents of the property, and, as by the terms of the will, *Rhoda O'Neale*, held a life estate in the property, and was required to pay the debts of the testator, it might properly be left for the jury to find, especially in view of the near family relations

existing between the parties, and the lapse of time, that the rents collected by *Evans*, for the benefit of his ward, had been so collected with the consent of the person who, under the will, was really entitled to receive them, and whose duty it had been made to apply them to the indebtedness of the testator.

Whether, *upon the weight* of the evidence, it was shown that the rents actually collected by *Evans*, were sufficient in amount, to satisfy the note in full, need not be considered.

It can matter not whether, upon this point, the evidence was weak or strong.

The note had been withdrawn from the stranger possession of the Bank, and transferred to friendly and family hands by the express direction of *Eaton*, an executor of the will, whose wife was, at once, the daughter of *Rhoda*, the tenant for life, and the mother of the ward of *Evans*.

It can scarcely be doubted that through this proceeding, some family adjustment of the indebtedness was intended.

And it would be going far to say that the evidence was destitute of all tendency to support the conclusion that the rents and profits of the property, however irregularly collected, had been accepted and applied by *Evans*, in satisfaction of the note.

That portion of the instruction, however, respecting the payment of the note, by means of rents collected by *Evans* down to July 29, 1843, became immaterial upon the granting of the 3d prayer of the plaintiffs below, and cannot now be assigned for error. (5 *Peters*, 135; 13 *How.*, 333–4; 10 *Wall.*, 528.)

The instruction, under this 3d prayer, held, in effect, that the trust deed was extinguished, if the jury found that out of the proceeds or income of the estate, the note had been paid either before July 29, 1843, "*or at any time prior to 1845.*" (*Rec.*, 13.)

Though the note had not been fully paid from the rents of the property, by *Evans*, before the relinquishment of his trust, as guardian, on July 29, 1843, it might yet be left to the jury to infer, in the absence of all evidence to the contrary, that through some other hand, or in some other manner, the rents continued to be applied towards the payment of the note, down to 1845. (1 *Greenl. Ev.*, § 41.)

The proposition of law, common to these prayers of the plaintiffs below, was that the deed of trust would be extinguished by satisfaction of the debt which it was executed to secure.

If there was any evidence to which this proposition was applicable, the instructions themselves were properly given.

It is well settled in this court, that the extent and duration of the estate conveyed to a trustee are to be measured by the objects of the trust, and that when these objects are fulfilled, the trustee ceases to exist, and his title becomes extinguished by operation of law.

If the deed of trust was extinguished before 1845, it followed, of course, that during the life of *Rhoda O'Neale*, there could be no adverse possession against the plaintiffs below.

Second Bill of Exceptions.

This exception was to the refusal of the court to charge, as requested by the defendants below, that the plaintiffs were barred, if while the deed of trust was in force, *Nailor*, in the fall of 1845, became the purchaser of the premises, under a sale made by *Adams*, cashier of the Bank, and,

thereupon, claiming title, entered upon and improved the property and held the open and "adverse possession thereof" for 20 years, and that such bar was "*not affected by the question whether the terms of sale were complied with or not*," nor by the institution of the ejectment in 1854. (*Rec.*, 14.)

If the prayer could not be granted in the precise form in which it was offered, (*Fowler* v. *Brantley*, 14 *Pet.*, 321; *Catts* v. *Phalen*, 2 *How.*, 321), or if any of the propositions it contained were unsound, (93 *U. S.*, 54; 95 *Id.*, 301), the exception was not well taken.

1. The prayer left to the ascertainment of the jury, the question whether the acts and occupation of *Nailor* amounted, as against the plaintiffs below, to an adverse possession.

"Adverse possession," this court have said, "is a legal idea, admits of a legal definition, of legal distinctions, and is therefore correctly laid down to be a question of law. *The whole argument in this case proves it.*" *Bradstreet* v. *Huntingdon*, 5 *Pet.*, 438.

See—

Cornelius et al. v. *Giberson*, 1 *Dutch.*, 1.
Paxton et al. v. *Park.*, 17 *Geo.*, 600.
Lockhart v. *Luker*, 36 *Miss.*, 68.

2. The prayer erroneously assumed that the bar "*was not affected by the question*," whether the terms of sale had been complied with or not. This will be considered hereafter in discussing the third bill of exceptions.

3. The prayer failed to deal with the question whether the possession of *Nailor* had been continuous.

Angell Lim., § 413 (5th Am. ed.)
Graft v. *Weakland*, 34 *Penn.* St. 304.
Henderson v. *Griffin*, 5 *Pet.*, 158.

The proceedings in the ejectment commenced by *Bradley* in 1854, tended to show that in 1855 judgment had been rendered against *Nailor*, as casual ejector; that on December 11, 1856, possession of the premises had been given under execution upon that judgment; that the execution had not been vacated until 1860; and that the judgment remained in full force and effect.

The instruction asked by the defendants below, was modified by the court.

From this arises—

The Third Bill of Exceptions.

1. This exception is, in terms, both to the modification of the prayer and to the instruction as given.

But so far as the instruction, as given, follows the prayer offered by the defendants below, they can have no ground of complaint.

To this extent, "it is a conclusive answer that the defendants themselves prayed for an instruction substantially like that given."

P. W. & B. R. R. Co. v. *Howard*, 13 *How.*, 343–4.

And to this extent, the errors, if any, of the instruction, "are to be imputed to the party making the request, rather than to the court."

The Schools v. *Risley*, 10 *Wall.*, 114.

2. The instruction, as given, so modified the prayer of the defendants below as to render the bar operative, if the jury should also find that *Nailor* had "complied with the terms of sale by payment of the purchase-money;" and such payment must be presumed, it was held, in the absence of proof to the contrary. (*Rec.*, 14.)

The proposition of law submitted by the defendants below, was, in substance, that the bar of the statute was "*not affected by the question*" of compliance with the terms of sale, if only it could be shown that *Nailor*, upon becoming the purchaser, had, under claim of title, entered and improved, and held the open and adverse possession of the property, for 20 years.

The ruling of the court was, in effect, that such entry and holding would, of themselves, constitute a bar, only in case the terms of sale had been complied with by payment of the purchase money.

3. There is certainly a distinction in the application of the statute of limitations to the case of a vendee in possession, who, though without deed, has paid the consideration money, and to a purchaser who has neither received a conveyance, nor complied with the terms of sale.

Where, on an agreement for the sale of land, the purchase money is paid, the entry and possession of the vendee become, by the mere fact of payment, immediately adverse to the vendor. *Angell Lim.*, §405, (5th Am. ed.)

And so, where the vendee repudiates his obligations as purchaser, by failure or refusal to comply with the terms of sale, his possession may become tortious and adverse to the vendor.

But where, under an executory contract of sale, the vendee is let into possession, without payment of the purchase money, that possession is, in the first instance, in subordination to the title of the vendor.

Boone vs. *Chiles*, 10 Pet., 227;
Jackson vs. *Bard*, 4 *Johns*, 233;
Jackson vs. *Camp*, 1 *Cowen*, 610;
Kilburn vs. *Ritchie* 2 *Cal.*, 148–9;
See *Mc Queen* vs. *Irey*, 36 *Ala.*, 312;
Ormond vs. *Martin*, 37 *Id.*, 602.

"It would shock that sense of right which must be felt equally by legislators and judges, if a possession which was permissive and entirely consistent with the title of another, should silently bar that title."

Kirk vs. *Smith*, 9 *Wheat.*, 288.

To render his possession adverse, the vendee must, by some unequivocal act, brought home to the vendor, manifest a repudiation of the contract.

Ripley vs. *Yale*, 18 *Vert.*, 223;

Adm'r of Robinson vs. *Ex'r of Jonhson*, 36 *Id.*, 74.

While the purchaser is claiming the benefit of the contract, recognizing its obligation, and making payments upon it, his possession can, in no sense, be considered as adverse to the vendor.

Wood vs. *Dille*, 11 *Ohio*, 455;

Angell Lim., §406, and cases cited.

Thus, while on the one hand, mere payment of the purchase money will render adverse the possession of the vendee, his possession, without deed, before payment of the purchase money, does not on the other, necessarily put in motion, the statute of limitation.

This will depend, in great measure, *upon the terms of sale.*

It was not pretended that *Nailor* received a conveyance for the property.

The terms of sale, as advertised, required the deferred notes to run at 4, 8, and 12 months, with interest, and to be secured *by deed of trust upon the property.*

There was evidence tending to show that on the alleged purchase by *Nailor*, the deferred payments were represented by "three notes for $400 each," "with John Hands as endorser," and were paid before maturity.

Now, until these notes matured (or were sooner paid), limitation could not commence to run in favor of the purchaser.

For until the maturity of the notes, the vendee would be in no default, and the vendor would have no right to recover possession.

But there was no evidence as to when these notes, given upon the alleged sale, matured, or at what time they were paid.

Consistently with all the evidence offered for the defense, the notes may have extended over a period of ten years, and have been paid only a month before maturity.

The debt evidenced by the note made by *William O'Neale*, was kept alive by renewals and payments, from 1820 until 1843.

The bar, therefore, so far from being "*not affected by the question*" of compliance with the terms of sale, depended materially upon it.

If the purchaser failed or refused to perform the contract, his possession became adverse. If there was no such failure or refusal, then, the possession could become adverse only from the time at which, according to the terms of the sale, the purchase-money was paid.

These considerations apply to the relations of the vendor and vendee, *inter sese.*

4. To render the possession of *Nailor* adverse to the plaintiffs below, that possession must have originated and been maintained, *under color of title.*

And color of title depends upon good faith.

Wright vs. *Mattison*, 18 *How.*, 59.

The power which the deed conferred upon the trustee, in the event of the non-payment of the debt, was the power "to SELL."

It did not extend to a voluntary conveyance or gift of the property.

From the very nature and object of the conveyance, as well as from the terms of the power itself, a pecuniary consideration was required upon the transfer of title under the execution of the power.

It was expressly provided that the proceeds of sale, less expenses, should be applied in the first place, to the satisfaction of the debt secured by the deed. (*Rec.*, 17.)

And the purchaser was bound to see that this application was made. 2 *Story Eq. Jur*, § 1,127.

For the trustee to surrender the property and renounce title to *Nailor*, without the semblance of equivalent or consideration, would have constituted a plain breach of trust. And the acceptance and assertion of ownership by *Nailor*, under such circumstances and with full knowledge of the facts, would have amounted to active participation in the fraudulent conduct of the trustee.

See *Wormley* v. *Wormley*, 8 *Wheat.*, 445;
Gregg v. *Lessee of Sayer et ux.*, 8 *Pet.*, 253.

The possession of *Nailor* would thus remain bound by the trusts declared in the original deed.

Mechanics' Bank of Alexandria v. *Seton*, 1 *Pet.*, 309;
2 *Story Eq. Jur.*, § 1.257.

To disturb a possession commenced and continued under such obligation, under penalty of relinquishing their title, by delay, could scarcely be required of the equitable remaindermen, during their own coverture and while a life estate in the equity of redemption was still outstanding in *Rhoda O'Neale*.

And, in this view of the subject, it seems impossible to maintain that the application of the statutory bar was "*not affected by the question*" of payment or not.

And as the jury have found that *Nailor* wholly failed to comply with the terms of the alleged sale, his possession was without color of title, and, therefore, not adverse to the plaintiffs below.

If any offer was at all made of the property, it is not unlikely that *Nailor* failed to comply with the terms of the sale, either because it was ascertained that the debt secured by the deed of trust had already been extinguished, or because it was considered that the power and estate vested by that deed in "*Bradley and his successor*" were not, upon the retirement of *Bradley* as cashier in 1827 (*Rec.* 10), transferred to *Adams*, his successor in office, by whom, in 1845, the property was advertised for sale. (*Rec.* 18.)

It would be going far to establish as a principle, that if a trustee fraudulently contrives to transfer the trust property to a mere volunteer, having notice of the fraud and actively participating in its perpetration, the neglect of the equitable tenant for life to recover the property in his lifetime, operates as a complete transfer of the title of the *cestuis que trust* in remainder, even before they are in a situation to assert any claim to possession, or in any manner to litigate their rights.

5. The finding of the jury upon the whole evidence negatives every fact which it was the object of the defendants below to establish at the trial.

Hepburn v. *Dubois*, 12 *Pet.*, 375.

And satisfaction of the debt, secured by the deed to *Bradley*, as well as the absence of any sale of the property, having been determined by the verdict, that deed, even if treated as a technical *mortgage*, could not be set up to defeat the action below, by those who had, in no wise, contributed to the payment of the debt.

Peltz et al., v. *Clark*, 5 *Pet.*, 483.

JOHN SELDEN,
Counsel for defendants in Error.

14-111

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~333.~~ 87

THE NEVADA BANK OF SAN FRANCISCO, PLAINTIFF IN ERROR,

vs.

JOHN SEDGWICK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED NOVEMBER 11, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 333.

THE NEVADA BANK OF SAN FRANCISCO, PLAINTIFF IN ERROR,

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of the ninth judicial circuit, within and for the district of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between the Nevada Bank of San Francisco, plaintiff in error, and John Sedgwick, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the 28th day of October next, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid be' inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 24th day of October, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the 103d.

The above writ of error is hereby allowed.

LORENZO SAWYER,
U. S. Circuit Judge, Ninth Judicial Circuit.

Attest, &c.:

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Deputy Clerk.*

b The answer of the judges of the circuit court of the United States for the district of California.

The record and all proceeding s of the plaint, whereof mention is with in made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States of America, within mentioned, at the day and place within contained in a certain schedule to this writ annexed, as within we are commanded.

By the court.

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Deputy Clerk.*

(Indorsed:) 1761. United States Supreme Court. The Nevada Bank of San Francisco, pl'ff in error, vs. John Sedgwick, def't in error. Writ of error. Filed 24th October, A. D. 1878. L. S. B. Sawyer, clerk, by J. F. O'Beirne, d'p'y cl'k.

c UNITED STATES OF AMERICA, *ss:*

To John Sedgwick, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States of America to be held at the city of Wash-

ington, in the District of Columbia, on the 28th day of October, A. D. 1878, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, of the ninth judicial circuit, in and for the district of California, wherein the Nevada Bank of San Francisco is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 24th day of October, A. D. 1878, and of the Independence of the United States the 103d.

[SEAL.] LORENZO SAWYER,
U. S. Circuit Judge, Ninth Judicial Circuit.

Service of a copy hereof admitted this 25th day of October, A. D. 1878.

J. M. COGHLAN,
Att'y for Def't in Error.

(Indorsed:) 1761. United States Supreme Court. The Nevada Bank of San Francisco, pl'ff in error, vs. John Sedgwick, def't in error. Citation. Filed 25th October, 1878. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

1 *Petition of defendant for removal of cause from State court to U. S. circuit court, dist. of Cal.*

United States circuit court, ninth circuit, district of California.

NEVADA BANK OF SAN FRANCISCO }
vs. }
JOHN SEDGWICK. }

To the hon. circuit court of the United States within and for the ninth circuit, district of California.

The petition of John Sedgwick respectfully represents to this hon. court that he was from the 20th day of May, A. D. 1873, until and inclusive of the 20th day of January, A. D. 1877, an internal revenue officer of the United States within and for the first collection district of California, namely, the collector of internal revenue, duly ap-
2 pointed under and acting by authority of the laws of the United States, and that a suit has been brought against him by summons in the district court of the fourth judicial district of the State of California, in and for the city and county of San Francisco, by the Nevada Bank of San Francisco, a corporation incorporated under the laws of the State of California, and having its office and principal place of business in the city and county of San Francisco aforesaid, to recover the sum of four thousand seven hundred and fifty-nine $\frac{26}{100}$ dollars, with interest on three thousand nine hundred and forty dollars thereof from July 22d, 1876, and with interest on eight hundred and nineteen $\frac{26}{100}$ dollars, the remainder thereof, from January 22d, 1876, as will appear by reference to the summons in said case, which is hereto attached and made part of this petition.

Your petitioner further respectfully represents that said suit is brought against petitioner to recover the sum of $4,759.26 collected
3 by him under the internal revenue laws as an officer of the

United States, to wit, as collector of internal revenue as aforesaid, and which said sum is alleged to have been wrongfully collected from plaintiff by him as taxes on assessments made by the Commissioner of Internal Revenue of the United States against the said plaintiff for and on account of taxes due to the United States from the said plaintiff upon property owned by said plaintiff.

Wherefore petitioner prays that said suit may be removed from the State court to this honorable court in accordance with the provisions of the laws in such case made and provided.

JOHN SEDGWICK.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

John Sedgwick, being duly sworn, deposes and says that he is
4 the defendant in the case entitled The Nevada Bank of San Francisco vs. John Sedgwick, now pending in the district of the fourth judicial district in and for the city and county of San Francisco; that he has read the foregoing petition, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on his information and belief, and as to those matters that he believes it to be true.

JOHN SEDGWICK.

Subscribed and sworn to before me this 27th day of April, A. D. 1877.

JOS. F. O'BEIRNE,
Comm'r U. S. Cir. C't Cal.

I, John M. Coghlan, do hereby certify that, as counsel for the petitioner, I have read the foregoing petition of John Sedgwick; that I have examined the preceedings in the case of the Nevada Bank
5 of San Francisco vs. John Sedgwick, pending in the fourth judicial district court of the State of California in and for the city and county of San Francisco, and have carefully enquired into all the matters set forth in said petition, and I believe the same to be true.

I do further certify that I am an attorney and counsellor at law duly admitted to practice in all the courts of the State of California and the United States district and circuit courts.

J. M. COGHLAN,
Attorney for Petitioner.

6 *Summons.*

In the district court of the fourth judicial district of the State of California in and for the city and county of San Francisco.

THE NEVADA BANK OF SAN FRANCISCO,
plaintiff,
vs.
JOHN SEDGWICK, DEFENDANT.

Action brought in the district court of the fourth judicial district of the State of California in and for the city and county of San Francis and the complaint filed in said city and county of San Francisco, in the office of the clerk of said district court.

The people of the State of California sending greeting to John Sedgwick, defendant:

You are hereby required to appear in an action brought against you

by the above-named plaintiff in the district court of the fourth judicial district of the State of California in and for the city and county of San Francisco and to answer the complaint filed therein within ten
7 days (exclusive of the day of service) after the service on you of this summons, if served within this county, or if served out of this county, but in this district, within twenty days, otherwise within forty days, or judgment by default will be taken against you according to the prayer of said complaint.

The said action is brought to recover judgment against said defendant for the sum of $4,759.26 alleged to be due to plaintiff from defendant upon two certain assessments of taxes made by said defendant as collector of the U. S. internal revenue in and for the district of California upon the property of said plaintiff, and paid by said plaintiff under protest, together with interest on $3,940 thereof from July 22d, 1876, and on $819.26, remaining part thereof, from January 22d, 1876, and costs of suit, all of which will fully appear in the complaint on file herein, to which reference is hereby expressly made.

And you are hereby notified that if you fail to appear and an-
8 swer the said complaint, as above required, the said plaintiff will take judgment against you for said sum of $4.759.26, with interest as aforesaid, and costs of suit.

Given under my hand and seal of the district of the fourth judicial district of the State of California in and for the city and county of San Francisco this 24th day of April, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL OF COURT.] THOS. H. REYNOLDS,
Clerk,
By CHAS. W. O. NEILL.
Deputy Clerk.

(Endorsed:) Filed 27 April, 1877. L. S. B. Sawyer, clerk.

9 *Complaint.*

In the district court of the fourth judicial district of the State of California, in and for the city and county of San Francisco.

THE NEVADA BANK OF SAN FRANCISCO, plaintiff,
vs.
JOHN SEDGWICK, DEFENDANT.

The plaintiff in the above entitled action complains of the defendant therein, and for cause of action avers and shows to the court:

I. That during all the several periods of time hereinafter stated, said plaintiff was, and still is, a corporation duly organized and acting under the laws of the State of California for the purpose of, and engaged in, the business of banking, and having its offices and principal place of business in said city and county of San Francisco.

10 II. That during all the several periods of time hereinafter stated said defendant, John Sedgwick, was the duly appointed, qualified, and acting collector of the internal revenue of the United States in and for the district of California.

III. Plaintiff further shows to the court that during the month of December, 1875, its average capital was the sum of five millions six hundred and eighty-one thousand eight hundred and eighteen dollars ($5,681,818.00), but of this amount the sum of nine hundred thousand

five hundred and seventy-nine dollars ($900,579) was, during said month of December, invested abroad and in foreign countries, to wit, three hundred and sixty-six thousand seven hundred and fifty dollars ($366,750.00) thereof in Europe, and five hundred and thirty-three thousand eight hundred and twenty-nine dollars ($533,829.00) thereof in the State of New York and other Atlantic States, and without the jurisdiction of the United States internal revenue commissioner in and
11 for the district of California.

And that during the month of January, 1876, its average capital was the sum of five millions six hundred and eighty-one thousand eight hundred and eighteen dollars ($5,681,818), but of this amount the sum of eight hundred and sixty-three thousand four hundred and eighteen dollars ($863,418) was, during said month of January, invested abroad and in foreign countries, to wit, three hundred and three thousand and fifty-eight dollars ($303,058) thereof in Europe and five hundred and sixty thousand three hundred and sixty dollars ($560,360) thereof in the State of New York and other Atlantic States, and without the jurisdiction of the United States internal revenue commissioner in and for the district of California.

And that during the month of February, 1876, its average capital was the sum of five millions six hundred and eighty-one thousand eight hundred and eighteen dollars ($5,681,818), but of this amount the sum
12 of one million one hundred and forty-six thousand three hundred and sixty-three dollars ($1,146,363) was, during said month of February, invested abroad and in foreign countries, to wit, four hundred and ninety-five thousand two hundred and thirteen dollars ($495,213) thereof in Europe and six hundred and fifty-one thousand one hundred and fifty dollars ($651,150) thereof in the State of New York and other Atlantic States, and without the jurisdiction of the United States internal revenue commissioner in and for the district of California.

And that during the month of March, 1876, its average capital was the sum of five millions six hundred and eighty-one thousand eight hundred and eighteen dollars ($5,681,818), but of this amount the sum of eighteen hundred and eighty-one thousand seven hundred and twenty dollars ($1,881,720) was, during said month of March, invested
13 abroad and in foreign countries, to wit, seven hundred and thirty-eight thousand and two dollars ($738,002) thereof in Europe and eleven hundred and forty-three thousand seven hundred and eighteen dollars ($1,143,718) thereof in the State of New York and other Atlantic States, and without the jurisdiction of the United States internal revenue commissioner in and for the district of California.

And that during the month of April, 1876, its average capital was the sum of five millions six hundred and eighty-one thousand eight hundred and eighteen dollars ($5,681,818), but of this amount the sum of two millions six hundred and ninety-three thousand five hundred and seventy-six dollars ($2,693,576) was, during said month of April, invested abroad and in foreign countries, to wit, fifteen hundred and forty-three thousand and ninety dollars ($1,543.090) thereof in Europe, and eleven hundred and fifty thousand four hundred eighty-six dollars ($1,150,486) thereof in the State of New York and other Atlantic States, and
14 without the jurisdiction of the United States internal revenue commissioner in and for the district of California.

And that during the month of May, 1876, its average capital was the sum of five millions six hundred and eighty-one thousand eight hundred and eighteen dollars ($5,681,818), but of this amount the sum of nineteen hundred and seventy thousand three hundred and thirty dollars

($1,970,330) was, during said month of May, invested abroad and in foreign countries, to wit, twelve hundred and three thousand one hundred and twenty-seven dollars ($1,203,127) thereof in Europe, and seven hundred and sixty-seven thousand two hundred and three dollars ($767,203) thereof in the State of New York and other Atlantic States, and without the jurisdiction of the United States internal revenue commissioner in and for the district of California.

IV. Plaintiff further shows that although said several sums of money were so invested abroad and in foreign countries, and although
15 this plaintiff so informed the United States Commissioner of Internal Revenue, and requested him to omit said amounts from the assessment of the taxes of plaintiff, yet said Commissioner refused so to do, and did include said several sums of money in the assessment of the taxes of plaintiff for the six months ending May 31st, 1876; that this plaintiff then and there protested against the action of said commissioner in so including said several sums of money in said assessment of the aforesaid taxes of plaintiff; that, notwithstanding such protest, said commissioner did include said several sums of money in said assessment of the taxes of plaintiff as aforesaid, and did thereupon certify and deliver such assessment to the above-named defendant as United States collector of internal revenue in and for the district of California, and under and by virtue of such assessment said defendant did demand payment of this plaintiff of the tax upon said several sums of
16 money, and said collector did then and there, at said city and county of San Francisco, on July 21, 1876, threaten plaintiff that under and by virtue of said assessment and warrant thereon, he would seize upon and distrain and sell the property of plaintiff, to pay and satisfy said taxes; and said collector was then and there about to seize and sell, and plaintiff believed and believes that said collector would then and there have seized upon, distrained, and sold the property of plaintiff to pay and satisfy said taxes, whereupon, in order to prevent such seizure, distraint, and sale of its property, and not otherwise, plaintiff did, on July 22d, 1876, pay to said collector the sum of three thousand nine hundred and forty dollars ($3,940), that being the amount of said taxes upon said several sums of money assessed, levied, and collected thereon as aforesaid.

V. Plaintiff further shows that at the time and place las' afore-
17 said, to wit, in said city and county of San Francisco, on July 21, 1876, and prior thereto, and thence hitherto, plaintiff was the owner of personal property of the value of five millions of dollars and upwards, within the sight and view of said collector, and which he might then and there have seized, distrained, and sold for nonpayment of said pretended taxes, had plaintiff then and there not paid the same, in order to prevent such seizure, distraint, and sale.

VI. Plaintiff further shows to the court that at the time of so paying said pretended taxes, this plaintiff did fully warn and notify in writing said collector of the illegality of said pretended taxes and protest against the payment thereof, and in such written notification and protest did distinctly set forth the grounds of the illegality of said pretended taxes, to wit, that plaintiff was not liable to taxation upon, for, or in respect of said several sums of money invested abroad and in foreign
18 countries as aforesaid, yet notwithstanding such protest, and in despite thereof, said collector did compel plaintiff to pay said pretended taxes as hereinbefore stated.

VII. Plaintiff further shows that immediately after paying said pretended taxes as aforesaid, this plaintiff did appeal to the United States

Commissioner of Internal Revenue to refund to plaintiff the amount of the taxes so illegally assessed against and collected from plaintiff as aforesaid, but said commissioner on December 18th, 1876, rejected said application and refused to refund to plaintiff said taxes, or any part thereof; that by reason of the premises said defendant did on July 22d, 1876, have and receive the sum of three thousand nine hundred and forty dollars ($3,940), to and for the use of plaintiff, in consideration whereof said defendant did then and there promise to pay plaintiff said sum of three thousand nine hundred and forty dollars ($3,940), but
19 though often thereunto requested, said defendant has and he does still wholly neglect and refuse to pay the same or any part thereof to plaintiff, and the whole of said sum of money last mentioned with interest thereon at the rate of ten per cent. per annum remains wholly due and unpaid from defendant to plaintiff.

VIII. And for a further, separate and distinct cause of action, plaintiff avers and shows to the court that during all the several periods of time hereinafter stated said plaintiff was and still is a corporation duly organized and acting under the laws of the State of California, for the purpose of and engaged in the business of banking, and having its offices and principal place of business in said city and county of San Francisco.

IX. That during all the several periods of time hereinafter stated said defendant, John Sedgwick, was the duly appointed, qualified, and
20 active collector of the internal revenue of the United States in and for the district of California.

X. Plaintiff further shows to the court that during the month of October, 1878, its average capital was the sum of four millions nine hundred and forty-eight thousand six hundred and eighty dollars ($4,948,680), but of this amount the sum of forty-eight thousand two hundred and thirty eight dollars ($48,238) was invested in United States bonds, leaving a balance of four millions nine hundred thousand four hundred and forty two dollars ($4,900,442), but of this amount of $4,900,442, the sum of two hundred and twenty-one thousand nine hundred and fifteen dollars ($221,915) was during said month of October invested abroad and in foreign countries, to wit, one hundred and twenty-six thousand six hundred and twenty-eight dollars ($126,628) thereof in Europe, and ninety-five thousand two hundred
21 and eighty seven dollars ($95,287) thereof in the State of New York and in other Atlantic States, and without the jurisdiction of the United States Internal Revenue Commissioner in and for the district of California. And that during the month of November, 1875, its average capital was the sum of five millions six hundred and eighty-one thousand eight hundred and eighteen dollars ($5,681,818), but of this amount the sum of two hundred and ninety-five dollars ($295) was invested in United States bonds, leaving a balance of five millions six hundred and eighty-one thousand five hundred and twenty-three dollars ($5,681,523), but of this amount, $5,681,523, the sum of one million seven hundred and forty-four thousand two hundred and ninety-four dollars ($1,744,294) was during said month of November invested abroad and in foreign countries, to wit, four hundred and forty-seven thou-
22 sand eight hundred and eighty-four dollars ($447,884) thereof in Europe, and one million two hundred and ninety-six thousand four hundred and ten dollars ($1,296,410) thereof in the State of New York and other Atlantic States, and without the jurisdiction of the United States Internal Revenue Commissioner in and for the district of California.

XI. Plaintiff further shows that although said several sums of money

were so invested abroad and in foreign countries, and although this plaintiff so informed the United States Commissioner of Internal Revenue, and requested him to omit said amounts from the assessment of the taxes of plaintiff, yet said commissioner refused so to do, and did include said several sums of money in the assessment of the taxes of plaintiff for the six months ending November 30th, 1875; that this plaintiff then and there protested against the action of said com-
23 missioner in so including said several sums of money in said assessment of the aforesaid taxes of plaintiff; that notwithstanding such protest said commissioner did include said several sums of money in said assessment of the taxes of plaintiff as aforesaid, and did thereupon certify and deliver such assessment to the above-named defendant as United States collector of internal revenue in and for the district of California, and under and by virtue of such assessment said defendant did demand payment of this plaintiff of the tax upon said several sums of money, and said collector did then and there at said city and county of San Francisco on or about January 21st, 1876, threaten plaintiff that under and by virtue of said assessment and warrant thereon he would seize upon and distrain and sell the property of plaintiff to pay and satisfy said taxes, and said collector was then and there about to seize and sell, and plaintiff believed and
24 believes that said collector would then and there have seized upon, distrained and sold the property of plaintiff to pay and satisfy said taxes; whereupon in order to prevent such seizure, distraint, and sale of its property and not otherwise plaintiff did on January 22d, 1876, pay to said collector the sum of eight hundred and nineteen $\frac{26}{100}$ dollars (819\frac{26}{100}$), that being the amount of said taxes upon said several sums of money assessed, levied, and collected thereon as aforesaid.

XII. Plaintiff further shows that at the time and place last aforesaid, to wit, in said city and county of San Francisco on January 21st, 1876, and prior thereto and thence hitherto plaintiff was the owner of personal property of the value of three millions of dollars and upwards, within the sight and view of said collector, and which he might then and there have seized, distrained, and sold for non-payment of said pre-
25 tended taxes, had plaintiff not then and there paid the same, in order to prevent such seizure, distraint, and sale.

XIII. Plaintiff further shows to the court that at the time of so paying said pretended taxes, this plaintiff did fully warn and notify in writing said collector of the illegality of said pretended taxes, and protest against the payment thereof, and in such written notification and protest did distinctly set forth the grounds of the illegality of said pretended taxes, to wit, that plaintiff was not liable to taxation upon, for, or in respect of said several sums of money invested abroad and in foreign countries as aforesaid, yet notwithstanding such protest, and in despite thereof, said collector did compel plaintiff to pay said pretended taxes, as hereinbefore stated.

XIV. Plaintiff further shows that immediately after paying
26 said pretended taxes as aforesaid, this plaintiff did duly appeal to the United States Commissioner of Internal Revenue to refund to plaintiff the amount of the taxes so illegally assessed against and collected from plaintiff as aforesaid, but said Commissioner, on December 18th, 1876, rejected said application, and refused to refund to plaintiff said taxes, or any part thereof; that by reason of the premises said defendant did, on January 22d, 1876, have and receive the sum of eight hundred and nineteen $\frac{26}{100}$ dollars ($819.26) to and for the use of plaintiff, in consideration whereof said defendant did then and there

promise to pay plaintiff said sum of eight hundred and nineteen $\frac{26}{100}$ dollars ($819.26), but though often thereunto requested, said defendant has and he does still wholly neglect and refuse to pay the same, or any part thereof, to plaintiff, and the whole of said sum of money last mentioned, with interest thereon at the rate of ten per cent. per an-
27 num, remains wholly due and unpaid from defendant to plaintiff.

Wherefore plaintiff prays judgment against said defendant for the sum of four thousand seven hundred and fifty-nine $\frac{26}{100}$ dollars ($4,759.26) with interest on three thousand nine hundred and forty dollars ($3,940) thereof from July 22d, 1876, and with interest on eight hundred and nineteen $\frac{26}{100}$ dollars ($819.26), the remainder thereof, from Jan'y 22d, 1876, at the rate of ten per cent. per annum, and costs of suit.

McALLISTERS & BERGIN,
Attorneys for Plaintiff.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Louis McLane, having been duly sworn, says that he is the president of the corporation, plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof;
28 that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

LOUIS McLANE.

Subscribed and sworn to before me this 19th day of April, A. D. 1877.

[SEAL.] J. H. BLOOD,
Notary Public.

I, Thos. H. Reynolds, county clerk of the city and county of San Francisco, State of California, and ex-officio clerk of the fourth district court, in and for said city and county, hereby certify the foregoing to be a full, true, and correct copy of the original complaint in the above-entitled cause, filed in my office on the 24th day of April, A. D. 1877.

Attest my hand and seal of said court this 22d day of May, A. D. 1877.

THOS. H. REYNOLDS,
By CHAS. W. O'NEILL,
Deputy Clerk.

29 (Endorsed:) Filed April 24th, 1877. Thos. H. Reynolds, clerk. By Wm. Ledlie, deputy clerk. In U. S. circuit court, dist. of California. Filed May 23d, 1877. L. S. B. Sawyer, clerk. By J. F. O'Beirne, dep'y cl'k.

30 *Demurrer.*

United States circuit court, ninth circuit, district of California.

THE NEVADA BANK OF SAN FRANCISCO, pl'ff,
vs.
JOHN SEDGWICK, DEF'T.

Now comes the defendant above named and demurs to plaintiff's

complaint filed herein, on the ground that it appears upon the face thereof that said complaint does not state facts sufficient to constitute a cause of action.

Wherefore defendant prays that he be hence dismissed with his costs.

J. M. COGHLAN,
Attorney for Defendant.

I hereby certify that in my opinion the foregoing demurrer is
31 well founded in law, and proper to be filed in the above cause.

J. M. COGHLAN,
Of Counsel for Defendant.

(Endorsed:)

Service of a copy of the within demurrer acknowledged this 23rd day of May, A. D. 1877.

McALLISTERS & BERGIN,
Att'ys for Pl'ff.

Filed May 23d, 1877.

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE,
Dep'y Cl'k.

32 *Order dismissing cause.*

At a stated term of the circuit court of the United States of America for the district of California, held at the court-house, in the city of San Francisco, on Monday, the seventh day of October, in the year of our Lord one thousand eight hundred and seventy eight.

Present, the honorable Lorenzo Sawyer, circuit judge.

THE NEVADA BANK OF SAN FRANCISCO
vs.
JOHN SEDGWICK.

This cause having previously come on to be heard upon the complaint and the demurrer interposed thereto, and the same having been submitted to the court for its consideration and decision, the court now here orders that said demurrer be, and the same is hereby, sus-
33 tained. And plaintiff being present in open court, by T. J. Bergin, esq., of counsel, and declining to amend its complaint, it is further ordered that this action be and the same is hereby dismissed, and that judgment be entered herein accordingly.

34 *Judgment.*

In the circuit court of the United States of America, of the ninth judicial circuit in and for the district of California.

THE NEVAD' BANK OF SAN FRANCISCO
vs.
JOHN SEDGWICK. No. 1761.

The court having upon this 7th day of October, A. D. 1878, being a day in the July, A. D. 1878, term of said court, ordered that the demurrer to the complaint herein, heretofore argued and submitted to the court for consideration and decision, be sustained, and the plaintiff de-

clining to amend its complaint, the court having thereupon ordered that said cause be dismissed:

Now therefore, by virtue of the law and by reason of the premises, it is considered by the court that the plaintiff take nothing by
35 this action, that the defendant go hereof without day, and that John Sedgwick, said defendant, recover from said plaintiff his costs in this behalf expended, taxed at .

Judgment entered the 7th day of October, 1878.

L. S. B. SAWYER, *Clerk.*

I hereby certify that the foregoing is a full, true, and correct copy of an original entered in the above entitled cause.

Attest my hand and the seal of said circuit court this 7th day of October, A. D. 1878.

[SEAL.] L. S. B. SAWYER, *Clerk.*

(Endorsed:) Filed October 7th, 1878. L. S. B. Sawyer, clerk.

36 *Certificate of clerk to judgment-roll.*

In the circuit court of the United States, ninth judicial circuit, district of California.

THE NEVADA BANK OF SAN FRANCISCO
vs.
JOHN SEDGWICK.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit, within and for the district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the therein-entitled action.

Witness my hand and the seal of said circuit court this 7th day of October, A. D. 1878.

[SEAL.] L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Deputy Clerk.*

(Endorsed:) Judgment-roll. Filed 7th October, 1878. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep'y clerk.

37 *Bond.*

In the Supreme Court of the United States of America.

THE NEVADA BANK OF SAN FRANCISCO, plaintiff in error,
vs.
JOHN SEDGWICK, DEFENDANT IN ERROR.

Know all men by these presents that we, The Nevada Bank of San Francisco, California, by its president, as principal, and Cornelius O'Connor and William H. Haverstick as sureties, are held and firmly bound unto John Sedgwick, defendant in error in the above-entitled action, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said John Sedgwick, his executors or administrators; to the payment of which, well and truly to be
38 made, we bind ourselves, and each of us jointly and severally, and our and each of our successors, heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated the 23d day of October, A. D. 1878.

Whereas the above-named The Nevada Bank of San Francisco has prosecuted a writ of error to the Supreme Court of the United States of America, to reverse the judgment rendered by the circuit court of the United States for the district of California in the cause entitled The Nevada Bank of San Francisco versus John Sedgwick:

Now, therefore, the condition of this obligation is such, that if the above-named The Nevada Bank of San Francisco, plaintiff in error, shall prosecute its said writ of error to effect, and answer all costs, if it shall fail to make good its plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

THE NEVADA BANK OF SAN FRANCISCO,
By LOUIS MCLANE, *President thereof.* [SEAL.]
39 C. O'CONNOR. [SEAL.]
W. H. HAVERSTICK. [SEAL.]

Signed, sealed, and delivered in presence of—
J. H. BLOOD.

UNITED STATES OF AMERICA,
District of California, ss:

Cornelius O'Connor and William H. Haverstick, being duly sworn, each for himself deposes and says that he is a householder in said district, and is worth the sum of five hundred dollars in lawful money of the United States of America, exclusive of property exempt from execution, and over and above all debts and liabilities.

C. O'CONNOR.
W. H. HAVERSTICK.

Subscribed and sworn to before me this 23d day of October, A. D. 1878.

[SEAL.] J. H. BLOOD,
Notary Public in and for city and county of San Francisco, State of California.

40 (Endorsed:)

The form of the within bond and the sufficiency of the sureties thereon are hereby approved.

(Signed) LORENZO SAWYER,
U. S. Circuit Judge, 9th Judicial Circuit.

Dated Oct. 24th, 1878.

Filed October 24th, 1878.

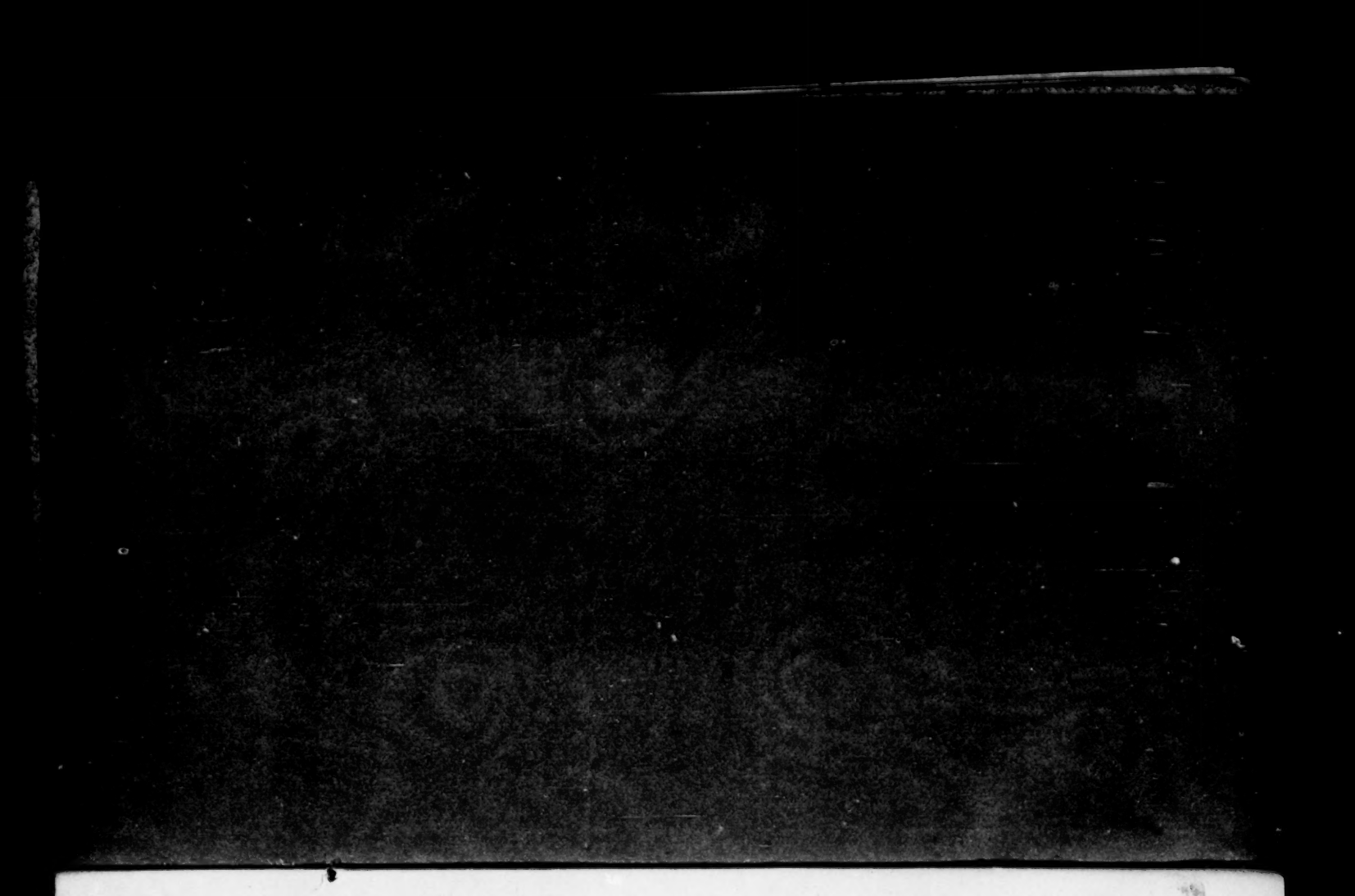
L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Dep. Clk.*

41 I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit, in and for the district of California, do hereby certify that the foregoing forty written pages, numbered from 1 to 40, inclusive, are a full, true and correct copy of the record and of all proceedings in the therein-entitled cause, and that the same together constitute the return to the annexed writ of error.

Witness my hand and seal of said circuit court this 1st day of November, A. D. 1878.

[SEAL.] L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Deputy Clerk.*

(Indorsement on cover:) No. 333. The Nevada Bank of San Francisco, plaintiff in error, vs. John Sedgwick. California C. C. U. S. Filed 11th November, 1878.



87

SUPREME COURT OF THE UNITED STATES.

THE NEVADA BANK OF SAN FRANCISCO,
Plaintiff in Error.

against

JOHN SEDGWICK,
Defendant in Error.

BRIEF AND POINTS OF PLAINTIFF IN ERROR.

JOHN E. WARD,
Of Counsel for Plaintiff in Error.

Supreme Court

OF THE UNITED STATES.

THE NEVADA BANK OF SAN FRANCISCO,
Plaintiff in Error,

against

JOHN SEDGWICK,
Defendant in Error.

Statement of Case.

1st. The plaintiff in error is a corporation duly incorporated under the laws of the State of California, and is engaged in the business of banking, and having its offices and principal place of business in the City and County of San Francisco, in the State of California.

2d. The defendant, John Sedgwick, was the duly appointed, qualified and acting Collector of Internal Revenue of the United States, in and for the District of California.

3d. In the month of December, 1875, and in the months of January, February, March, April and May, 1876, and in the month of October, 1878, and in the month of November, 1878,

a portion of the banking capital of the plaintiff was invested abroad, a part in Europe and a part in New York. The Commissioner of Internal Revenue, with a knowledge of these facts, included in the assessment of the taxes of the plaintiff, and against the protests of the plaintiff, the several sums of money invested in Europe and New York, in the the assessment of the taxes of the plaintiff, and certified and delivered such assessments to the United States Collector of Internal Revenue, in and for the District of California, and under such assessments, the defendant, as the collector of the internal revenue of the United States, demanded payment of the tax on the said several sums of money, and being about to seize upon and sell the property of the plaintiff, the plaintiff paid under protest the taxes upon the said several sums of money to prevent such seizure and sale, and now brings this action to recover from the defendant the taxes upon said sums of money so illegally assessed and taken from plaintiff.

4th. To a declaration stating these facts, the defendant filed a demurrer.

5th. The court below, the Circuit Court of the United States for the Ninth Circuit District of California, sustained the demurrer, and from that decision the case is now before this court on appeal.

ASSIGNMENT OF ERROR.

The court below erred in sustaining the demurrer of the defendant in error to the complaint filed by the plaintiff in error, and rendering judgment for the defendant in error, and against the plaintiff in error

POINTS.

The single question presented by the record to the court is the right of the United States Commissioner of Internal Revenue to assess taxes against the plaintiff for such portion of its capital as was actually in Europe and in New York, and of the defendant to collect these taxes from the plaintiff. The liability of the plaintiff to pay any taxes on its capital, or any portion thereof, is created by an act of Congress.

See Rev. Stat., § 3408.

Under this statute two questions necessarily arise—

1st. The power of the Government to require the payment of those taxes.

2d. Upon what portion of the capital of the bank did Congress mean that the taxes should be assessed.

The first point has been so often before this court and has been so fully discussed from the case of the Vezie Bank *vs.* Fenno, 8th Wall, 533, when with a divided court it was decided that Congress had the undoubted right in the exercise of its power to provide a currency for the whole country, to secure the benefit of it by appropriate legislation, this decision having been ever since acquiesced in, it may be conceded that the taxing power of the Federal Government, where there is no express limitation in the constitution, is almost without limit. I say almost, because it must have some limit, and that limit seems to be, that it must be confined to subjects within its jurisdiction.

See Cooley on Taxation, p. 121, chap. 5.

Besides this, there are other limitations, the government being without power to tax the means or agencies of the States, and the States without power to tax a fiscal agent of the government. Various instances of the limitation of this power of taxation may be found in the reports of the decisions of this court, and in the reports of the decisions of the different States of the Union.

McCullock *vs.* Maryland, 4th Wheaton, p. 316, 368.
Railroad *vs.* Jackson, 7 Wall, p. 319.
Hoyt *vs.* Commissioner, 23d N. Y. Reports, p. 224.

In this case, and under the pleadings, it may be conceded, and I am disposed to make the concession, that the assessment on that portion of the capital of the plaintiff employed in

New York and in other parts of the United States was correctly made and collected.

See Act of Congress, Rev. Stat., § 3408, and declaration.

But a very different question is presented as to the assessment upon that portion of the capital of the plaintiff which was not in this country but in Europe when the assessment was made. In relation to that portion of the capital of the defendant, Congress had not the power to levy a tax, and it is evident by the wording of the statute that Congress never intended to exercise any such power.

Kirtland *v.* Hotchkiss, 10 Otto, 497.

All of which is respectfully submitted.

JOHN E. WARD,
Of Counsel for Defendant in Error.

H. — 112

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 451.

THE LEHIGH VALLEY RAILROAD COMPANY AND ASA PACKER, PRESIDENT OF SAID COMPANY, APPELLANTS,

vs.

EDWARD MELLON AND WILLIAM MATTHEWS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED AUGUST 7, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 451.

THE LEHIGH VALLEY RAILROAD COMPANY AND ASA PACKER, PRESIDENT OF SAID COMPANY, APPELLANTS,

vs.

EDWARD MELLON AND WILLIAM MATTHEWS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

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1 In the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit. No. 2. April session, 1868.

EDWARD MELLON
vs.
THE LEHIGH VALLEY RAILROAD COMPANY, A corporation created by and existing under the laws of the State of Pennsylvania, and Asa Packer, president of said company.

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of April session, 1868, No. 2.

2 It is thus contained:

Be it remembered that heretofore, to wit, on the 11th day of April, A. D. 1868, came Edward Mellon, by *their* solicitor, Furman Sheppard, esq., and filed of record in our said court here his bill of complaint against the Lehigh Valley Railroad Company and Asa Packer, president of said company, which said bill being read is in the words and tenor following, to wit:

3 Circuit court of the United States in and for the eastern district of Pennsylvania. In equity.

EDWARD MELLON
v.
THE LEHIGH VALLEY RAILROAD COMPANY, A corporation created by and existing under the laws of the State of Pennsylvania, and Asa Packer, president of said company.

To the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania:

Edward Mellon, of Scranton, Pennsylvania, brings this bill against the Lehigh Valley Railroad Company, a corporation created by and existing under the laws of the State of Pennsylvania, and Asa Packer, president of said company.

And thereupon your orator complains and says that on or before the 2d day of October, 1866, he, the said Edward Mellon, was the true, original, and first inventor or discoverer of a certain new and useful improved mode of attaching tires to wheels of locomotives not known or used by others before his invention or discovery thereof, and
4 not, at the time of his application for letters patent of the United States therefor, in public use or on sale with his consent or allowance.

And your orator further shows unto your honors that he, the said Edward Mellon, so being the inventor of said improvement, and being a citizen of the United States aforesaid, made application to the proper department of the Government of the United States for letters patent therefor in accordance with the then existing laws of Congress, and having duly complied in all respects with the conditions and requisitions of said laws, on the 2d day of October, A. D. 1866, letters patent of the United States, signed, sealed, and executed in due form of law for his invention or discovery were issued to the aforesaid Edward Mellon,

whereby they were secured to him, his heirs, executors, and assigns for the term of seventeen years from the 2d day of October, 1866, the full and exclusive right of making, using, and vending to others to be used the said improvement as specified and set forth in said letters patent now on record in the Patent Office of the United States, which, or an exemplified copy of which, your orator will produce as your honors may direct.

And your orator further shows unto your honors that said invention has been and is of great practical use and benefit to your orator, and that he has applied the said improvements to large and extensive use, and that the public and the users of said improvements have acknowledged and acquiesced in the value of said invention, and the aforesaid rights of your orator under said letters patent, and that your orator has been, and, but for the infringement hereinafter complained of, would
5 still be, in the undisturbed possession, use, and enjoyment of the exclusive privileges secured by the said letters patent and in receipt of the profits of the same.

And your orator further shows unto your honors, as he is informed and believes, that the said defendants hereinafter named, well knowing all the facts hereinbefore set forth, but contriving to injure your orator and deprive him of the benefits and advantages which might and otherwise would accrue to him from said invention and letters patent, have been and now are wrongfully and unlawfully constructing and using the said patented improvement, in some parts thereof substantially the same in construction and operation as in the said letters patent mentioned, the exclusive right and privilege to make and use which, and vend the same to others to be used, are thus by law vested in your orator.

But so it is, may it please your honors, that the said defendants, as your orator is informed and believes, without the license of your orator and against his will and in violation of his rights, have made and used, and intend to continue still to make and use the said improvement within the eastern district of Pennsylvania, all of which is in violation of the said letters patent and assignments.

To the end, therefore, that the defendants may, if they can, show reason why your orator should not have the relief hereby prayed, and that they may make a full disclosure and discovery of all the matters aforesaid, and upon their several corporal oaths and according to the best and utmost of their knowledge, remembrance, information and belief full, true, direct, and perfect answer make, to such of the several
6 interrogatories hereinafter numbered and set forth, as by the note hereunder written they are required to answer, that is to say:

I. Whether the said original letters patent were granted and issued to the said Edward Mellon, and the same are now vested in him as hereinabove mentioned?

II. Whether the said defendants, their agents, servants, or employees have, or either or any, and which of them, has at any time, and, if so, when and where, and during what period of time, made, constructed, sold or used any, and if so, how many tires or wheels substantially similar in any, and, if so, in what respect, to the tires or wheels or the mode of attachment described in the letters patent above mentioned, and at what profit have the same been so made, constructed, sold or used?

III. Whether the tires or wheels or mode of attachment, made, constructed, sold or used by the said defendants, or by either, and which of them differ in construction, mode of operation or otherwise, in any, and if so, in what substantial and material respect, from the tires or wheels

described in said letters patent, and if so, describe minutely and in detail all such differences.

IV. Whether the said defendants, their agents, servants or workmen, have at any time, and if so, when and to what extent, made, constructed, sold, or used, in whole or in part, the device described in said letters patent, or any device similar to or resembling the same, or any, and if so, what part thereof?

7 And now to the end that the defendants may be compelled to account for and pay over the income thus lawfully derived from the violation of the rights of your orator as above, and be restrained from any further violation of said rights, your orator prays that your honors may grant a writ of injunction, restraining the defendants, their servants, agents or employees from any further construction or sale or use in any manner of said patented improvement, or any part thereof in violation of the rights of your orator as aforesaid, and that the tires or wheels containing said improvement now in possession or use of the said defendants may be destroyed, or delivered up to your orator for that purpose. And your orator prays for such other relief as the equity of the case may require and to your honors may seem meet.

May it please your honors to grant unto your orator not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna of the United States of America, directed to the said The Lehigh Valley Railroad Company, and Asa Packer, president of said company, and commanding them to appear and answer unto this bill of complaint and to abide and perform such order and decree in the premises as to the court shall seem meet, and be required by the principles of equity and good conscience.

EDWARD MELLON.

FURMAN SHEPPARD,
Solicitor for Complainant.

The defendants are required to answer each of the foregoing interrogatories numbered one to four each inclusive.

FURMAN SHEPPARD,
Solicitor for Complainant.

8 On the 11th day of April, A. D. 1868, before the subscriber came Edward Mellon, the complainant in the foregoing bill named, who, being duly sworn, says that so far as the statements therein contained are within his own knowledge, they are true, and so far as they are derived from the information of others, he verily believes them to be true. And he further says that he verily believes that he, the said Edward Mellon, in said bill named, is the original, true and first inventor of the new and useful improved mode of attaching tires to wheels of locomotives, which is described in the letters patent granted to him, the said Edward Mellon, and mentioned in the foregoing bill. And your deponent verily believes that the title of him, the said complainant, as set forth in said bill, is true.

EDWARD MELLON.

Sworn & subscribed before me this 11th day of April, A. D. 1868.
W. GRIER HIBLER,
U. S. Commissioner.

9 (Endorsed:) No. 2. April, 1868. Circuit court United States, eastern district of Pennsylvania. Edward Mellon vs. The Lehigh

Valley Railroad Company and Asa Packer, president of said company. Bill in equity.

Issue subpœna returnable the first Monday of May.

FURMAN SHEPPARD,
Sol'r for Complainant.

Filed 11 April, 1868.

10 And afterwards, to wit, on the 23rd day of July, A. D. 1868, the defendants, by their attorney, James E. Gowen, esq., come into our said court here and file their answer to the bill of complaint, which said answer, being filed, is in the words following, to wit:

11 In the circuit court of the United States in and for the eastern district of Pennsylvania. In equity.

EDWARD MELLON
vs.
THE LEHIGH VALLEY RAILROAD COMPANY et al.

The joint and separate answer of the Lehigh Valley Railroad Company and of Asa Packer, president of the said company, to the bill of complaint of the said Edward Mellon.

These defendants, reserving to themselves all right of exception to the said bill, for answer thereunto say:

1. That they deny that the complainant was the inventor or discoverer of the alleged new and useful improved mode of attaching tires to wheels of locomotives, described in the letters patent granted to the said complainant, and that they further deny that the said mode was not known or used by others before his pretended invention thereof. That they aver that the plan or mode of holding the tires of locomotive wheels in their place by means of a flange or shoulder extended from the rim of the wheel and lapped over or let into the tire, or by means of a flange or shoulder extended from the tire and lapped over or let into the rim of the wheel (as the said plan or mode is described in the specifica-

12 tions and drawings annexed to the letters patent granted to the complainant), was well known and had been put in practical use before the issue of the said letters patent. That on the 18th of November, 1851, letters patent of the United States of America were granted to a certain Nehemiah Hodge for a new and useful improvement in railroad car-wheels, and one of the drawings (that styled Figure 2) annexed to the specifications on which the said letters patent were granted shows a flange or shoulder from the rim of the wheel, projecting over or overlapping the tire, just as the same device is shown in the drawing (Figure 2) annexed to the letters patent granted to the complainant, except that in the former case the inner side of the flange is rectangular in shape, while in the latter it is curved, as by reference to the said two drawings, both of which are on file in the Pattent Office at Washington, will fully appear. That in the year 1854 letters patent were granted in England to Emanuel Wharton, for the invention of a method of attaching tires to car-wheels by using a flange similar to that described in the letters patent issued to complainant, excepting that the flange is delineated with an interior surface rectilinear and not curved. And defendants have been informed and believe that a model or models of tires with

such flanges were exhibited in the year 1864, in the city of New York, and the specifications and drawings accompanying the said patent are now in the library of the Franklin Institute, in the city of Philadelphia, as of the year A. D. 1853, No. 2695. That numerous designs for tires of locomotive-wheels, with projecting flanges to fit into or lap
13 over the wheels, some of the said flanges being of rectilinear and some of curved outline on the inner side, were published in the year 1862, in a collection of drawings entitled (in English) "Sections of Patent Cast-steel Tyres, without a Weld, supplied from the cast-steel works of Fried. Krupp, at Essen, Rhenish Prussia," which collection was circulated in this country as early as August, 1864.

2. That they have not been informed, save by complainant's bill, and cannot set forth as to their belief or otherwise, as to the averments in the said bill in reference to the citizenship of the complainant and his compliance with the requisitions of the law in reference to applications for patents, but they believe, and therefore admit, that letters patent, as in his bill described, were issued to him on the 2d of October, 1866.

3. That they cannot say whether the said invention has or has not been of use and benefit to complainant, or whether he has applied the said alleged improvement to large and extensive use. That these defendants have never acknowledged or acquiesced in the pretended rights of the complainant, and do not believe that others have. And they deny that but for the alleged infringement complained of in the said bill the complainant would be in the possession and enjoyment of the exclusive privileges which the said letters patent purport to secure to him, or in the receipt of the profits of the same.

4. That the corporation defendant had, more than two years be-
14 fore the grant of the said letters patent, made use of tires having a projecting flange let into the rim of the wheel to which they were attached, in the same mode, substantially, as is shown at the letter A in the second figure in the drawing attached to the letters patent issued to complainant, excepting that the inner surface of the said flange was rectilinear and not curved. That the said corporation defendant has since continued to construct and make use of tires secured by flanges of the same or like character, but has not constructed or used flanges with a curved surface, although the said corporation insists that it was and is fully authorized to do so, and that the pretence that the said complainant has the exclusive right to construct or to license others to construct tires with flanges either curved or rectilinear is without foundation.

And to the several interrogatories annexed to the complainant's bill these defendants, further answering, say:

To the first: That letters patent were granted to the complainant on the 2d day of October, 1866, for "an improved mode of attaching tires to the wheels of locomotives," as will appear on the production of the same or of a duly certified copy thereof by the said complainant. But these defendants, for the reasons above stated, deny that the said letters patent are valid, or that they confer the rights and privileges therein referred to or described.

To the second, third, and fourth: That the defendant corporation has constructed and used and still uses locomotive-wheel tires secured by flanges to the wheels themselves, as above described, but they
15 deny that in so doing they have infringed any legal right of the said complainant; and for further answer to these interrogatories they refer to their answers to the averments in the complainant's bill.

And these defendants, not admitting that any other matter, cause, or thing in the said bill contained, not herein and hereby well and sufficiently answered, confessed and avoided, traversed or denied, is true to the knowledge or belief of the defendants, pray to be hence dismissed, with their reasonable costs and charges in this behalf wrongfully sustained.

ASA PACKER. [SEAL.]

Asa Packer, being duly sworn, deposes and says that what is contained in the foregoing answer, so far as concerns his own act and deed, is true to his own knowledge, and that which relates to the act and deed of any other person he believes to be true.

ASA PACKER.

Sworn to & subscribed July 22, '68.

D. P. BROWN, JR.,
U. S. Com'r.

16 (Endorsed:) C. C. U. S., E. D. of Pa. No. 2, April sess., 1868. Mellon vs. The Lehigh Valley R. R. Co. et al. Answer. Filed 23 July, 1868.

17 And afterwards, to wit, on the 28th day of October, A. D. 18 8, the complainant by his attorney comes into our said court here and files his replication to the defendants' answer, which said replication, being filed, is in the words following, to wit:

18 In the circuit court of the United States in and for the eastern district of Pennsylvania. April session, 1868. No. 2. In equity.

EDWARD MELLON
v.
LEHIGH VALLEY RAILROAD COMPANY ET AL.

The replication of Edward Mellon, complainant, to the answer of the Lehigh Valley Railroad Company, defendants.

This repliant, saving and reserving all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that he will aver and prove the said bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by the said bill is already prayed.

FURMAN SHEPPARD,
Solicitor for Complainant.

(Endorsed:) C. C. U. S. April sess., 1868. No. 2. In equity. Mellon vs. Lehigh Valley R. R. Replication. Filed 28 October, 1868.

19 EXHIBIT A.—C. B.

No. 58447.

The United States of America to all to whom these letters patent shall come:

Whereas Edward Mellon, of Scranton, Pennsylvania, has alleged that he has invented a new and useful improved mode of attaching tires to wheels of locomotives, which he states has not been known or used before his application, has made oath that he is a citizen of the United States; that he does verily believe that he is the original and first inventor or discoverer of the said invention, and that the same hath not, to the best of his knowledge and belief, been previously known or used; has paid into the Treasury of the United States the sum of thirty-five dollars, and presented a petition to the Commissioner of Patents signifying a desire of obtaining an exclusive property in the said invention, and praying that a patent may be granted for that purpose: These are, therefore, to grant, according to law, to the said Edward Mellon, his heirs, administrators or assigns, for the term of seventeen years from the second day of October, one thousand eight hundred and sixty-six, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used the said invention, a description whereof is given in the words of the said Edward Mellon in the schedule hereunto annexed, and is made a part of these presents.

In testimony whereof I have caused these letters to be made
20 patent and the seal of the Patent Office has been hereunto affixed.

Given under my hand at the city of Washington this second day of October, in the year of our Lord one thousand eight hundred and sixty-six, and of the Independence of the United States of America the ninety-first.

W. T. OTTO,
Acting Secretary of the Interior.

T. C. THEAKER,
Commissioner of Patents.

The schedule referred to in these letters patent, and making part of the same.

To all whom it may concern:

Be it known that I, Edward Mellon, of Scranton, in the county of Luzerne and State of Pennsylvania, have invented a new and useful improvement in applying tires to locomotive wheels, and I do hereby declare that the following is a full, clear and exact description thereof, which will enable others skilled in the art to make and use the same, reference being had to the accompanying drawings forming part of this specification, in which

Figures 1 and 2 are central sections of a locomotive wheel having a tire applied to it according to my invention.

Figure 3 a section of a portion of a locomotive wheel having
21 its tire affected by wear, drawn with a view of showing the advantage of one feature of my invention.

Similar letters of reference indicate like parts.

This invention has for its object the securing of tires on the wheels of locomotives without the aid of bolts, and in such a manner that the tire, in case of becoming loose, cannot casually slip off from the wheel.

The invention consists in having the wheel, or the tire which is to be fitted on the same, provided with a single flange, arranged in such a manner that said flange, in connection with the usual flange on the tire, will keep the latter on the wheel. The invention also consists in constructing the tire with a rounded edge at one side of its inner surface in order to prevent said edge from indenting and sinking into the periphery of the wheel, a contingency which would otherwise occur in consequence of the tire becoming stretched by ~~long~~ use.

A represents a locomotive-wheel which may be constructed in the usual or any proper manner, and B is the tire fitted thereon. The periphery of the wheel A is provided at the inner edge with a flange *a*, as shown in figures 1 and 2.

The tire B is shrunk on the periphery of the wheel A, as usual, and it will be seen that the flange *a* prevents the tire, should it become loose on the wheel A, from slipping off at the inner side of the wheel, and the flange *b* of the tire will of course prevent the latter from slipping off at the outer side of the wheel.

By this arrangement no bolts or set screws are required to aid
22 in fastening the tire on the wheel, for it is impossible for the tire to leave the wheel either at the right or left side thereof.

The same result may be attained by having the inner surface of the tire at its outer edge provided with a flange, *a'*, as shown at the upper part of figure 2.

The inner surface of the tire at its inner edge is rounded, as shown at *c*, in all the figures, in order to prevent said edge from indenting or sinking into the periphery of the wheel. The tires of locomotive-wheels are, under the jars, concussions, and wear to which they are subjected, considerably stretched, and they invariably become concave at their inner surface (see figure 3), the edges spreading over the sides of the wheel, and forming in a lock, in some cases, so as to render the cutting of the tire necessary, in order to detach it from the wheel. With my improvement the flange *a* would cause the inner edge of the inner surface of the tire to indent the periphery of the wheel, or form a crease in it if the edge *c* were not rounded.

The great feature in this invention is that I retain the tire on the wheel without the employment of bolts, rivets, keys or other like attachments. I heat my tire until it has expanded sufficiently to be slipped over the periphery of the wheel; it then cools and contracts, and holds or binds the wheel firmly.

After the wheel, as completed, has been in use a certain length of time, the tire will stretch and thus become loose on the wheel; then the pressure of the resistance against the rail will bear or force the tire inward against the flange *a* of the wheel.

Now, it is not intended to run the engine unnecessarily with a
23 loose tire, but should this tire become loose while on the road, there is sufficient safety in running the engine until the depot is reached or until it will be convenient to repair or replace it by a new one.

The tire can be readily slipped off, there being no rivets or other fastenings to undo, and the convenience and utility of my improvement is apparent.

I am aware of the invention described in patent to N. Hodge, November 18, 1851, but I wish it to be understood that I do not claim the invention therein described, viz, the angular flange upon the edge of the wheel and the flange upon the outer edge of the wheel, but I do claim as my invention the wheel with the curved flange upon the inner edge

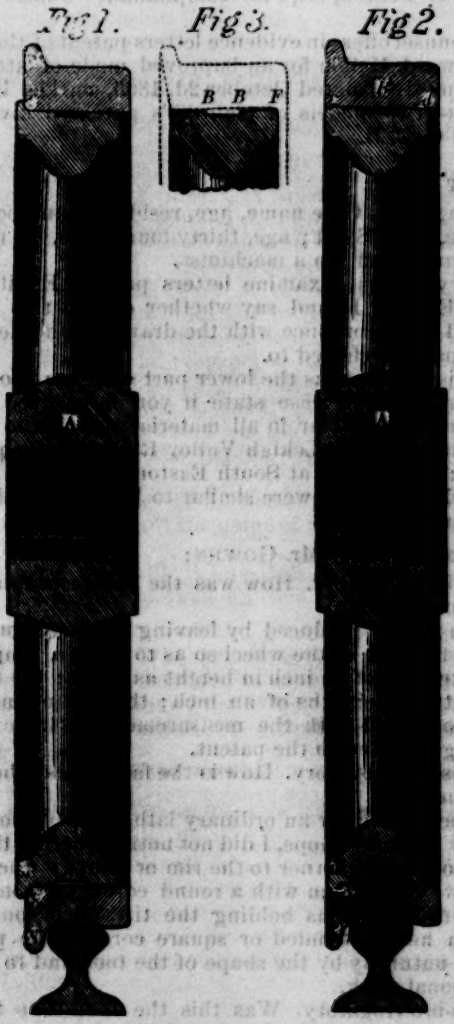
in combination with a tire with a rounded corner, to fit said curved flange, as set forth.

The above specification of my invention signed by me this 9th day of September, 1865.

EDWARD MELLON.

Witnesses:
M. M. LIVINGSTON.
C. L. TOPLIFF.

24



25 *Depositions on the part of the complainant.*

In the circuit court of the United States in and for the eastern district of Pennsylvania, October session, 1868. No. 2. In equity.

EDWARD MELLON
v.
THE LEHIGH VALLEY RAILROAD COMPANY and Asa Packer, president.

WEDNESDAY, *February* 22, 1871.

Present, H. T. Fenton, esq., for complainant; James E. Gowen, for respondent.

Plaintiff's counsel offers in evidence letters patent of the United States granted to Edward Mellon for an improved mode of attaching tires to wheels of locomotives, dated October 2d, 1866, marked Exhibit A, C. B.

Also models—two models of plaintiff's patented invention, marked Exhibit B and C, C. B.

JOHN SWIFT sworn:

First interrogatory. Give name, age, residence, and occupation.

A. My name, John Swift; age, thirty-four years. I reside at Scranton, Pennsylvania, and am a machinist.

Interrogatory second. Examine letters patent, Exhibit A, and the model, Exhibit B, and say whether or not this exhibit is con-
26 structed in accordance with the drawings and description in the letters patent referred to.

This model is the same as the lower part of figure two.

Third interrogatory. Please state if you have ever seen tires and wheels, substantially similar in all material respects to Exhibit*it* B, in the machine-shops of the Lehigh Valley Railroad Company at Easton.

A. Yes, sir; I saw them at South Easton; the shops of the company are at South Easton; they were similar to Exhibit B; this was in 1866, as near as I can remember.

Cross-examined by Mr. GOWEN:

First cross-interrogatory. How was the flange constructed in those you saw there?

A. The flange was produced by leaving a projection on the wheel, turning down the face of the wheel so as to leave a projecting flange of about five-sixteenths of an inch in height as a rim; the thickness of the flange is about three-eighths of an inch; the rim on model B is exaggerated, as compared with the measurements I have given and the model drawing annexed to the patent.

Second cross-interrogatory. How is the face of the wheel turned down so as to get the rim?

A. It can be turned by an ordinary lathe; as to those I saw in the Lehigh Valley Railroad shops, I did not notice whether they were turned with a round or square corner to the rim or flange; when we turn them at our shops we leave them with a round corner; I consider the shape immaterial, as far as holding the tire on is concerned, whether
27 the rim has a rounded or square corner; the round corner is formed naturally by the shape of the tool, and to square it would require additional work.

Third cross-interrogatory. Was this the first time that you saw a wheel with a rim or flange of that description?

(Question objected to.)

A. No, sir; it was not the first time.

Fourth cross-interrogatory. Will you please state where you have seen it before?

(Question objected to.)

A. I had seen it in our own shops, Dickson Manufacturing Company, at Scranton, and I know that we used it on one engine at that time.

JOHN SWIFT.

Sworn to and subscribed before me this 22d day of February, A. D. 1871.

CRAIG BIDDLE,
Examiner.

AUSTIN MOORE sworn:

First interrogatory. Please give your name, age, residence, and occupation.

A. My name is Austin Moore; I am a machinist and engineer; thirty-six years of age, and reside at Scranton.

Second interrogatory. Examine Exhibit C, and letters patent, Exhibit A, and state whether or not Exhibit C is constructed in accordance with the drawing and specification contained in the letters patent referred to.

A. I find that it is constructed in accordance with the upper
28 part of figures 2 and 3. There is no lower part in figure 3; figure 3 is drawn to show the effect of the stretching of the tire from rolling on the rails; it stretches the tire in the centre part of the tread.

Interrogatory third. State whether or not you have ever seen wheels and tires similar in all material respects to Exhibit C on any, and, if so, how many, locomotives of the Lehigh Valley Railroad Company.

A. I have seen them on four locomotives; tires precisely similar to the model Exhibit C; I saw them on the afternoon of February 20, 1871, in the engine-house of the Lehigh Valley Railroad Company, at South Easton.

Fourth interrogatory. State the names of the locomotives you refer to, and state also whether or not the name of the corporation, defendant, was marked on them.

A. The names were Bushkill, White Hall, Beaver, and Nevada; the letters L. V. R. R. Co. were marked on each of the engines or tenders.

Cross-examined by Mr. GOWEN:

First cross-interrogatory. Was the inner rim or flange of the tire rounded or square on the locomotives to which you refer?

A. I do not know as to that; I could not tell, as it is covered up; the corner of the base of the inside rim or flange in Exhibit C is angular; in the drawing it is curved.

AUSTIN MOORE.

Sworn to and subscribed before me this 22d day of February, A. D. 1871.

CRAIG BIDDLE.

29 *Depositions on behalf of respondents.*

In the circuit court of the United States in and for the eastern district of Pennsylvania.—October session, 1868.—No. 1 in equity.

EDWARD MELLON
v.
THE LEHIGH VALLEY RAILROAD COMPANY AND Asa Packer, president.

THURSDAY, *May* 16, 1872.

Present, H. T. Fenton, esq., for complainant, and Alexander Campbell, esq., for defendants.

Mr. Campbell offers certified copy of letters patent to Nehemiah Hodge, dated November 18, 1851, No. 8526, called an improvement in railroad car wheels (marked Exhibit D).

(Objected to by Mr. Fenton.)

J. I. KINSEY sworn:

I am a master mechanic, in the employ of the Lehigh Valley Railroad, and have been for sixteen years, at the South Easton shops; I have had charge, during that time, of building and repairing a number of locomotives; I am familiar with locomotive wheels and tires; I cannot tell whether Exhibit C. is intended to represent an angular
30 or curved flange upon the tire; if it be intended to represent an angle, it is not made in accordance with the drawings and specifications attached to plaintiff's patent; the Lehigh Valley Railroad Company do not use any wheel or tire with a rounded flange, in accordance with plaintiff's patent; ours have got a small shoulder in the tire and no shoulder on the wheel-centre; the shoulder I refer to is angular in all cases; we have none with a rounded shoulder in use on the Lehigh Valley Railroad.

Q. When, to the best of your knowledge, was the shoulder you have just referred to put in use on the Lehigh Valley Road?

(Question objected to).

A. In September, 1865; this was at the shops of the Lehigh Valley Railroad Company, at South Easton.

Q. Had you previously to that time attached tires to the centres of locomotive wheels without the use of bolts, screws, or rivets?

(Objected to).

A. I did, in 1859; the object in using the shoulder was simply to guide the tire to its proper place in setting it; I don't know whether the method of using the shoulder is in common use.

Q. Does the angular flange that you have referred to have a tendency to indent or cut a crease in the wheel's centre?

A. No, sir; not those that I [redacted] See

Q. Is it possible, after the tire has been attached to the wheel-centre, to determine whether the shoulder or flange referred to is rounded or angular?

A. No, sir; because you can't see.

31 (Model Exhibit E shown to witness).

This is a model, prepared under my direction, of the flange or shoulder on the tire in use on defendant's road; this is the only kind we use; the model (Exhibit F) is made on a scale of an inch to the foot, as well as the model Exhibit E, and is a correct representation of Figure 2 attached to complainant's patent.

Cross-examined by Mr. FENTON:

I am not familiar with all the engines in use on defendant's railroad; I see them, but only examine those that come into the shops of South Easton; in the tire on Exhibit E the angle on the flange is a perfect right angle; it is turned on by a lathe; I make a sharp angle on the inner edge of the tire; we use no bolts, screws, or nuts in fastening the tire on; all the tires we bore out, we bore out in that way; I am speaking only for the South Easton shops; we frequently examine the wheels and tires we make, after they have been in use for some time.

Q. Please state the appearance of the wheels and tires that the company use, after they have been in use on an engine for some time?

(Question objected to by Mr. Campbell as irrelevant and not proper cross-examination.)

A. I have had no occasion to renew any of these steel tires after they have been put on; we cannot see the inside of a tire until it is taken off; I refer to the steel tires with the angular flange on; we have some wrought iron tires running yet; we renew them with steel tires when they are worn out; our company never used any wrought iron tires
32 with the flange on the tire; the company do not manufacture tires; they buy them and fit them on the wheels; the wrought iron tires we use are shrunk on, not fastened on by bolts; there is no flange either on the wheel or on the tire; no fastening whatever, only the shrinkage; the tire could not come inward on account of the frame, or outward on account of the flange of the wheel on the rail, and could not come off the centre unless it broke; I know that the tires put on by our company are a right angle on the flange of the tire, because the lathe is so arranged as to cut a right angle, and the face of the wheel is then squared down to fit it; the lathe always cuts a right angle, unless altered to cut a different angle.

(Objected to by Mr. Campbell as immaterial and irrelevant.)

The corner of the flange is a perfect right angle; in use, the tire, like Exhibit E, does not cut into or injure the wheel in any way, to my knowledge; the stretching of the outside of the tire causes the inner surface to rise in an arch, concave; this is in wrought iron tires; I have not seen it in steel tires; we shrink the steel tires on, the same as the iron ones; the wheel-centres are made of ordinary cast iron.

Q. If the corners on your steel tires were perfect right angles, and in use, the wheel in stretching would rise on the inner surface, and would it not crush the corners of the wheel centres?

A. The tires are wider than the face of the wheel-centres, consequently the corners of the tires project over the wheel-centres, and the pressure comes upon the sides, instead of upon the face of the
33 wheel; I have never known an instance of a wheel being broken from such a cause; in Exhibit E the pressure would come upon the side of the wheel, on the outer edge, and on the inner edge there would be no pressure at all, because the tire of the wheel projects over the face of the wheel-centre; this model is made on the scale of an inch to the foot; the tires I mentioned as having put on in 1859 were wrought iron, and had no flanges on them, but were perfectly plain.

Re-examined:

I know the engine Bushkill; she has been repaired at the South Easton shops; she was made in Massachusetts; the flange on the tires of this engine has a square shoulder like Exhibit E. I know the en-

gine Whitehall, but she has never been in my shop. The engine Nevada has the same flange as in Exhibit E.

J. I. KINSEY,
Master Mechanic Lehigh Valley R. R. Co., South Easton Shop.

PHILIP HOFECKER affirmed:

I am a master machinist in the employ of the Lehigh Valley Railroad, and have been so, I think, since 1864. Prior to that time I held the same position in the same shop with the Beaver Meadow Railroad, since consolidated. I am at the shops at Weatherly, Carbon County. I have had charge of building and repairing a good many locomotives, and am familiar with locomotives, tires, and wheels. To the best of my knowledge there is not on the Beaver Meadow Division of the Lehigh
31 Valley Railroad, my division, any flange, or rim, or shoulder similar to that described in plaintiff's patent. The wheels' centres are turned straight without any shoulders on our division. The tires are turned as in Exhibit E, with a shoulder intended to be square. There may be some variation in consequence of the wear of the tool.

(Mr. Fenton objects.)

We use the shoulder more to set the tire by than anything else. We first used the shoulder in May 26th, 1864, on the engine Pacific; since then we have continued to use it on steel tires. It seems to me there came a cut or drawing showing this shoulder on a tire accompanying a set of tires purchased from Krupp in Germany. (See page 123, Krupp's book.)

(Objected to by Mr. Fenton.)

We bored out that set of tires with the projection like the drawing, and have continued to do so since. So far as I know, the projection does not have a tendency to indent or cut a crease in the wheel centre. Exhibit E is a correct representation of the form of the tires in use on our road. I know the engine Beaver; she was built at the Weatherly shops under my direction. The tire has a square projection like the model. I had attached tires to locomotive wheels without the use of bolts or other fastenings prior to 1864, but how long I can't say. These were plain tires without flanges, just as they came from the rolling-mill; the use of the angular flange on the tire was kept no secret; any one could see the tires being bored out; after they were put on you
35 could not see it. I never heard of plaintiff's patent until after this suit was brought. We never turned at our shops any tires without a rounded shoulder; after the tire is attached to the wheel and the tire is in place, it is impossible to tell whether the shoulder is rounded or angular, because it cannot be seen.

Cross-examined by Mr. FENTON:

Q. How do you know that it was in 1864 that you first used the shoulder on page 123 of Krupp's book, to which you have referred?

A. There is a memorandum in the book in which we keep an account of the tires, when put on and by whom made. The book says Krupp's cast steel. Chamberlain bought it as one of Krupp's Prussian steel tires. We put it in a lathe and bored it out. The tire came plain, that is perfectly parallel with the centre. Nothing more on the book to show that was the tire referred to, except the words "Krupp's steel tire." I think his stamp was on it, but am not sure. The date I have given was when it was put on; I don't know how long before it was received. The company, the Beaver Meadow Railroad and Coal Company, had the book I referred to. I had control over the book, but a clerk made the

entries. I have not seen the book lately, but it is up there, and can be produced at any time if required. A small memorandum book, taken from the original book, I saw and testified from as to the date.

Q. Examine the drawing of Krupp's book, page 123, and state whether it has not marked on the drawing "wagons and tender."

(Objected to, as the writing is the best evidence of its contents, and because it is immaterial.)

A. It has; it speaks for itself.

36 Q. What do you understand by the words "wagons and tenders"?

A. I should suppose "tenders" meant the car carrying water and coal that follows the engine; I should suppose the words referred to the tires; if not, I don't know what they referred to.

Q. Do you find on other drawings in this book (Exhibit G) the word locomotive and the word wagons?

(Question objected to, as the book is the best evidence of its contents; because it is not proper cross-examination, and because the evidence is immaterial and irrelevant.)

A. Yes; I find some marked in that way.

Q. What do you understand those words to refer to?

A. I suppose to "locomotives" and to whatever they call their "wagons"; the wheel on which I put the steel tires was good cast iron; I would suppose from the drawing, page 123, that it was a steel tire to be used on a cast iron wheel; I don't know that the use of cast iron wheels is prohibited in England and on the continent.

Q. In boring or cutting the tires at the defendant's shops, where you are employed, please to state what radius or curvature does the tool wear which is used in cutting in the angle in the flange on the tire.

A. The tool would wear very slightly; we always try to be careful to keep a sharp corner on the tool; these are our orders to the men; we work with a diamond pointed tool, and the reason we are so careful is that the shoulder should fit exactly on the wheel; if the

37 angle is obtuse the shoulder would not fit on the wheel so well; it would not make so much difference, but it would not make so nice a job. The wrought iron tire we never bore out; we put it on plain without the flange; but the steel tire we bore out, and leave the shoulder on to fit in nice on the wheel centres.

Q. If this flange or shoulder on the tire was only a convenience for setting the tire, state whether or not the tires would be any more permanent on that account.

A. No; I don't know as it would; it is the shrinkage that holds it.

Q. Why did you not continue the use of the tires without the flanges?

A. The steel has to be turned out, and therefore they leave the flange on for convenience in setting; this is because steel will not give as much as iron; on the iron tires we leave no shoulder; the steel tire is very much superior to the wrought iron, and therefore we gave up the iron; I don't know the tire with the flange has any advantage over the one without it, except for convenience in setting; Exhibit E represents the tires we use at our shop.

Q. Please state whether or not, in the tires you use, the inside inner edge of the tire is perfectly rectangular or slightly rounded.

A. The face of the tire is rolled and the centre cut, which leaves the corner sharp; but whether it is a perfect right angle I can't say, unless we face it up on the outside; I said the projection or flange does not have a tendency to indent the wheel-centre, so far as I know.

38 Q. Would the inner side of the tire, when rectangular, as in

Exhibit E, have a tendency when in use to indent or crush the wheel-centre?

A. Not that I have observed.

Q. Have you ever examined a wheel and tire made like like Exhibit E, with rectangular corners, after the same had been in use and the tire stretched in wear, and, if so, what appearance did the wheel centre present? Was it or was it not perfectly smooth and non-indented?

A. I have seen none; all the tires we have put on have never been taken off; I do not, therefore, know what appearance a wheel would present after such tire was taken off.

Q. In a tire and wheel, as in Exhibit E, would the tire rise in the centre from the bottom without becoming loose from the wheel?

A. I never noticed on steel tires; on iron tires it would slightly.

PHILIP HOFECKER.

Affirmed and subscribed before me this 16th day of May, A. D. 1872.

CRAIG BIDDLE,
Examiner.

L. CHAMBERLAIN affirmed.

I am treasurer of the Lehigh Valley Railroad; I received this book (Krupp's book dated 1862) about the time that I ordered the first steel tires from him referred to by Mr. Hofecker; I obtained it from Thomas Prosser & Sons, Krupp's agent in New York; there was no difficulty in obtaining copies; I have obtained several copies since, and have furnished one to complainant's counsel; I believe any one making application there could obtain a copy.

39

(Exhibit G, book referred to, offered.)

No cross-examination.

(Mr. Fenton objects to foregoing testimony of Mr. Chamberlain and to the book produced.)

L. CHAMBERLAIN.

Sworn to and subscribed before me this 16th day of May, A. D. 1872.

CRAIG BIDDLE,
Examiner.

Mr. Campbell offers copy of letters patent of the Kingdom of Great Britain to Emanuel Wharton for railway wheels, No. 2695.

(Objected to as irrelevant.)

Respondents close.

40 *Complainant's rebuttal.*

In the circuit court of the United States in and for the eastern district of Pennsylvania.

MELLON
v.
LEHIGH VALLEY RAILROAD.

THURSDAY, *October* 24, 1872.

Present, Messrs. Campbell and Fenton.

EDWARD MELLON sworn.

Reside in Scranton; am 43 years of age; I am complainant in this case, and the patentee in the letters patent sued on.

Q. 1. Please state whether or not any persons or corporations, and

which, have acquiesced in and acknowledged the validity of your patent, and paid royalties to you for the use of it.

(Question objected to as irrelevant, and that admissions by other parties cannot affect defendant's liability.)

A. Some have; the Delaware, Lackawanna and Western Railroad Company, a Pennsylvania corporation, I think, have used my patent in Pennsylvania, in New Jersey and New York, and have paid me royalties for the use of my patent on locomotives; also the Dickson Manufacturing Company, a Pennsylvania corporation, at their building-shop at Scranton; they send their engines wherever ordered, all over
41 the country; they also pay me royalties for the use of my invention.

Cross-examined by Mr. CAMPBELL:

C. Q. 1. Have you brought suit against any company except the Lehigh Valley Railroad Company?

(Objected to as not cross-examination and as irrelevant.)

A. No, sir; I have not. This is the first company that has refused to pay.

C. Q. 2. What royalty was paid you by the Delaware, Lackawanna and Western Company?

A. I demanded as a royalty ten dollars on each tire. When I left their employment in 1867 we were uncertain how many tires were in use on their road, some old tires being replaced with new ones, and we made a settlement up to April, 1867, for a lumping sum of two hundred and forty-six dollars.

C. Q. 3. Since that date how much have they paid?

A. They have not paid anything since that date.

C. Q. 4. Are they still using your improvement?

(Objected to as not cross-examination and irrelevant.)

A. They are.

C. Q. 5. Is the tire in use on the Delaware, Lackawanna and Western road constructed with a curved flange on the wheel centre as in Exhibit B?

(Same objection.)

A. Some were made like Exhibit B with the curved flange on the wheel centre, and some like Exhibit C, but the flange on the tire.

C. Q. 6. Was the flange on the tire (Exhibit C) angular or curved?

(Objected to.)

42 A. It is a certain angle.

C. Q. 7. What royalty did the Dickson Manufacturing Company pay?

A. Ten dollars per tire for all tires over forty inches in diameter and five dollars for tires under it. Those under forty inches are considered pilot wheels.

C. Q. 8. On how many tires have the Dickson Manufacturing Company paid you royalty?

A. Their books will show exactly. To the best of my knowledge I have received about three thousand dollars.

C. Q. 9. Did the Dickson Manufacturing Company use the tire with a curved flange on wheel centre, as in Exhibit B, or the angular flange on the tire, as in Exhibit C?

A. I have put them on in both ways, but they seemed to prefer the former.

C. Q. 10. Are they still using your improvement and paying you royalties?

A. They are.

C. Q. 11. At the date of your patent were you not acquainted with the patent issued to Nehemiah Hodge, dated November 18, 1851?

(Objected to as not cross-examination and as irrelevant.)

A. I was. I saw it in Washington before the board of examiners in chief at the Patent Office.

Re-examined:

Q. 1. Why did the Delaware, Lackawanna and Western Railroad refuse to pay after their last settlement?

(Objected to.)

43 A. The reason they gave me was that Robert H. Sayle, superintendent of the Lehigh Valley road, told them that they were using my invention and would not pay me, but intended to fight it, and they asked me not to sue but to get a settlement from the Lehigh Valley, and they would pay as soon as that settlement was made; when I say they told me, I mean Mr. Brisbin, the president of the Delaware, Lackawanna and Western. He was bargaining with me at the time for my patent for the use of their whole road.

EDWARD MELLON.

Sworn to and subscribed before me this 24th day of October, 1872.

CRAIG BIDDLE,
U. S. Commissioner.

GEORGE G. LISK sworn.

I reside in Scranton, Pa.; am forty years of age; am a blacksmith; repairing locomotives my principal business; I am in the employ of the Delaware, Lackawanna and Western Railroad Company; have been for the past nineteen or twenty years doing the same kind of work. I am acquainted with the manufacture of tires for locomotives; have been for nineteen or twenty years. Have put on tires on most of the builders' engines going. I am acquainted with Mellon's patented tire, and never saw a tire put on a locomotive wheel without being secured by nuts, bolts, or screws prior to Mr. Mellon's improvement.

44 Q. 1. State whether or not in using tires on locomotive wheels where the tire is secured by bolts or nuts, the tire will rise in the centre on the inner surface and crush the edges of the wheel centre, and break the nuts or bolts or rivets that secure it when the tire and wheel are put in use.

A. Yes, sir; it will.

Q. 2. How much did you ever see a tire rise?

A. On those of the largest size of wrought iron tires, I have seen it rise as much as three-quarters of an inch. This is of frequent occurrence. It occurs with every wheel and tire made in that manner. This paper (witness identifies the paper) correctly represents a tire secured by bolts, stretched or bell-mouthed in that manner.

(Paper marked Exhibit Lisk offered.

Objected to by Mr. Campbell.)

Q. 3. In the use of Mellon's patent improvement state whether or not this stretching occurs, and if so, whether it injures the wheel centre or loosens the tire?

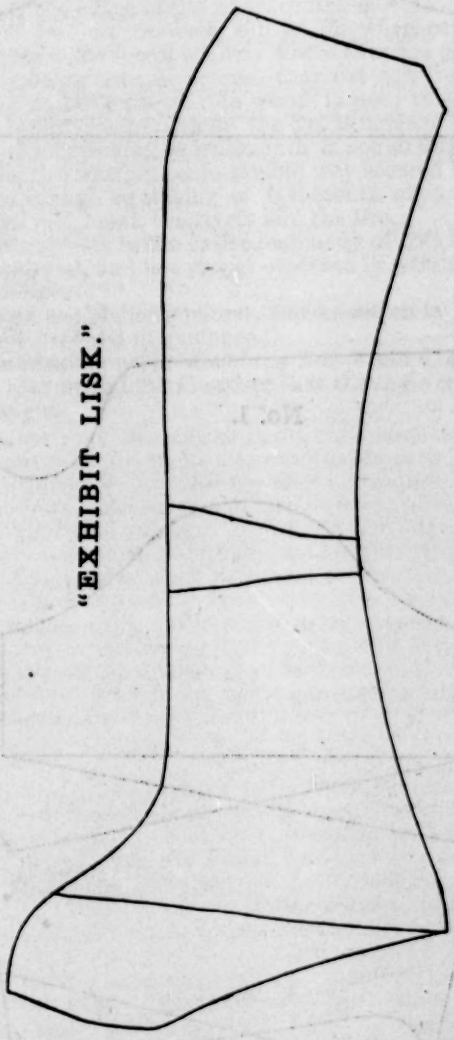
A. The stretching occurs very little, not so much as in the old way. It does not injure the wheel centre or loosen the tire from the wheel centre.

Q. 4. Please examine these two drawings (drawings Nos. 1 and 2 shown witness) and explain what they represent.

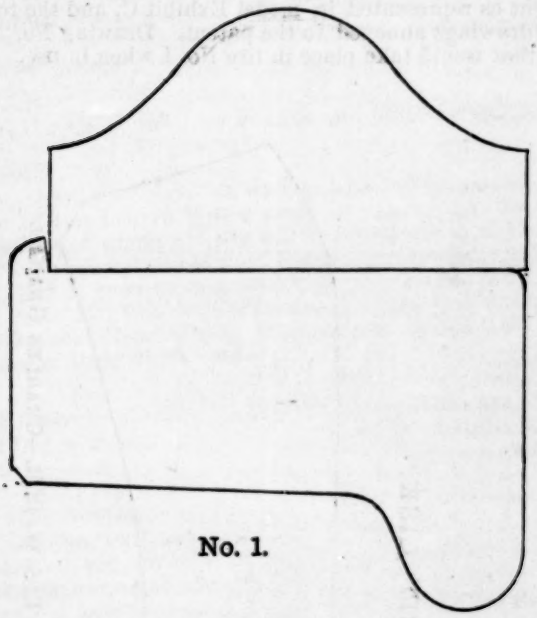
A. Exhibit C I know nothing about. Drawing No. 1 shows Mellon's improvement as represented in model Exhibit C, and the top of figure two in the drawings annexed to the patent. Drawing No. 2 shows the stretching that would take place in tire No. 1 when in use.

45

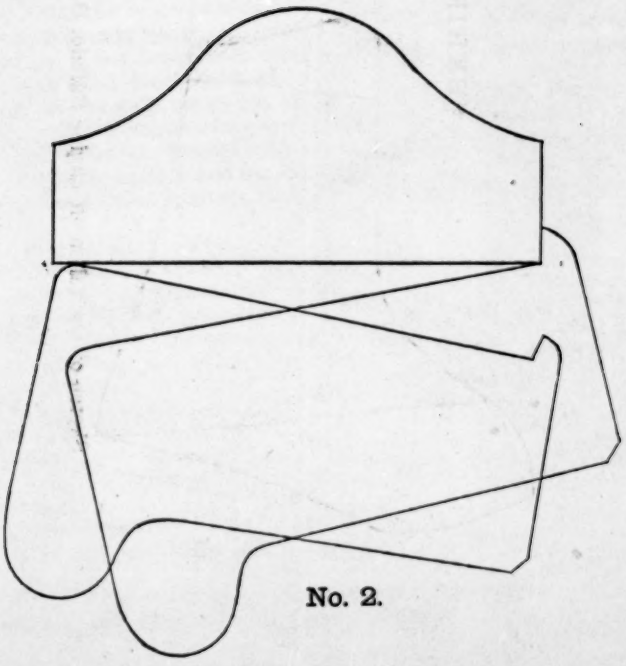
"EXHIBIT LISK."



Sketch of tire taken off engine Buffalo, D. L. & W. R. R.—CHARLES GRAHAM.



No. 1.



No. 2.

47 (Drawings offered in evidence.)
(Objected to by Mr. Campbell.)

Q. 5. Please examine paper drawings No. 3 and 4, and state what they represent.

A. No. 3 represents Mellon's improvement as shown in model, Exhibit B, and in drawing annexed to patent, bottom of figure 2; No. 4 shows the stretching of the tire No. 3; the reason why the tire on No. 4 does not crush the edges of the wheel-centre is because the tire has a perfect base to rest on, on each side of the wheel-centre, and in use binds itself tight on the wheel-centre; where tires are put on wheels in the old way, by bolts, nuts, or screws, they not only break the wheel-centre in practice, but come off the wheel in use; this never happens with Mellon's improvement; where the tire is made of steel instead of wrought iron, the stretching or bell-mouth is not so large—in fact very little; if a steel tire was put on in the old way secured by bolts or nuts there would be enough stretching or bell-mouth when in use to injure the wheel-centre and break the rivets and the tire.

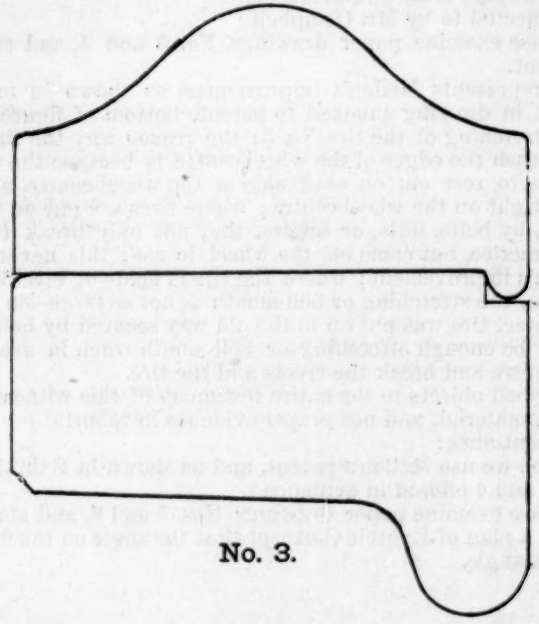
(Mr. Campbell objects to the entire testimony of this witness as irrelevant and immaterial, and not proper evidence in rebuttal.)

Witness continues:

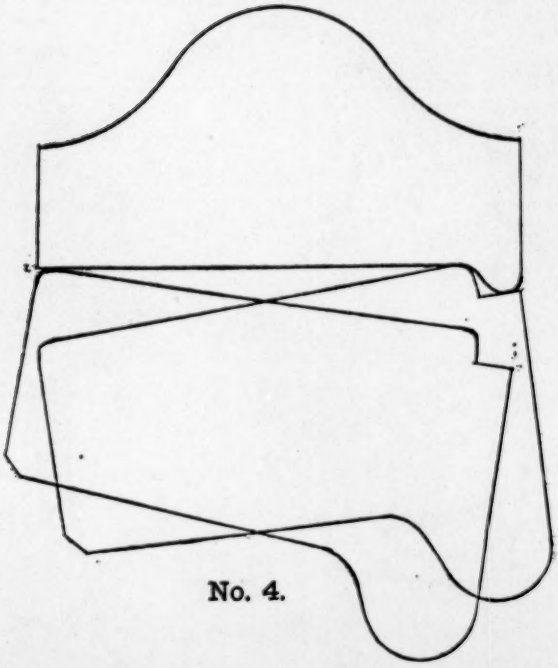
In our shop we use Mellon's patent, and as shown in Exhibit B.

(Papers 3 and 4 offered in evidence.)

Q. 6. Please examine paper drawings Nos. 5 and 6, and state first if No. 5 shows a plan of Exhibit C except that the angle on the flange is a perfect right angle.



No. 3.



No. 4.

49 A. It does.

Q. 7. Please examine paper drawing No. 6, and state if it correctly represents how the stretching would effect the wheel centre and tire No. 5 when in use.

A. Yes, sir; it does.

Q. 8. State whether or not if the angle on the flange was a perfect right angle as in Papers No. 5 and 6, it would, in use, either bend the flange or break it off or crush the corner of the wheel centre on which it impinges.

A. It would raise in the centre. I do not think it would crush the corner of the wheel centre; but if it rose to any extent it would either break off the flange or bend it.

Q. 9. Is it possible in mechanics to turn a perfect right angle on an inner flange of a steel tire?

A. No, sir; I don't think it is. One reason, they would not take the necessary trouble to make the tools. The edge of the tool would wear off before it made a perfect revolution, and consequently it would not make a perfect right angle. The tool begins to wear as soon as the lathe starts.

(Nos. 5 and 6 offered in evidence.)

Cross-examined by Mr. CAMPBELL:

C. Q. 1. Can you tell me about when you first saw Mr. Mellon's invention?

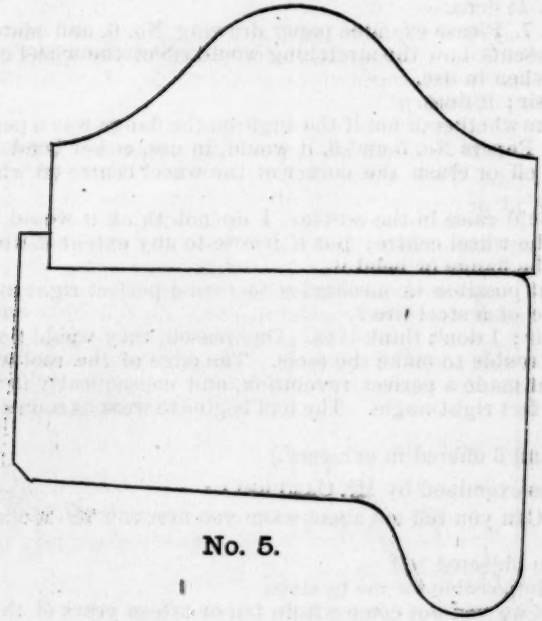
(Question objected to.)

A. It is impossible for me to state.

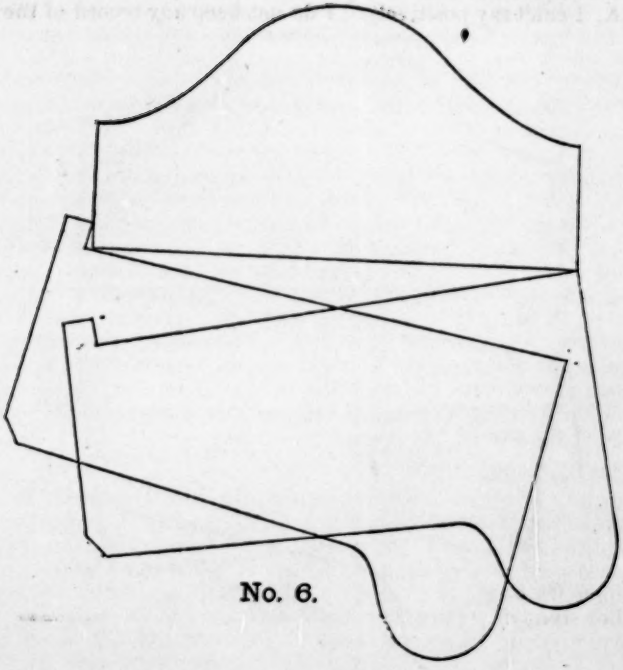
C. Q. 2. Can you not come within ten or fifteen years of the time?

A. I can't say positively. I do not keep any record of the tires

50



No. 5.



No. 6.

51 put on. The company may do so. I think they do. I suppose this is kept by the assistant master mechanic, Michael Welsh, or the master mechanic, Walter Dawson. They both reside at Scranton.

C. Q. 3. Please look at drawings 5 and 6, and state how they differ from Mr. Mellon's patent?

(Objected to.)

A. The difference is, the shoulder in the drawings is square; I am not familiar with the engines on the Lehigh Valley road; prior to the time I attached Mr. Mellon's tire I never saw it used on any other road; I have seen different roads and different engines; I never saw a tire put on without nuts or screws; I do not believe it is possible to turn a perfectly true right angle on a tire; you might come somewhere near it.

(Last part objected to.)

C. Q. 4. How near could you come to it?

A. I don't know anything about it; I never turned any.

C. Q. 5. What is your particular business?

A. General repair of locomotives.

GEORGE G. LISK.

Sworn and subscribed before me this 24th day of October, A. D. 1872.

CRAIG BIDDLE,
U. S. Commissioner.

FRIDAY, *October* 25.

EDWARD MELLON (recalled by Mr. Fenton:)

Q. 1. Please state whether or not you examined the wheel and
52 tire of the locomotive belonging to the Lehigh Valley Company and in use by them; and, if so, state when and where and whether or not the wheel and tire were constructed substantially similar in all material respects to model (Exhibit C) and the corresponding drawings in the letters patent sued on and the specifications annexed thereto.

A. I have examined several of the engines of the Lehigh Valley Company, and on several occasions; in the month of April, 1867, I examined several of their engines at Mauch Chunk, in particular the A. Packer and the Reliance; I detected my invention on those engines; the wheel and tire on those engines were like Exhibit C; they were on the engine at the time; the flange I considered to be an obtuse angle, because I thrust an ordinary-sized pocket-knife blade between the flange and the tire, at the side of the wheel; it proved that the angle was wider than a right angle, because a wheel-centre that is not made specially conical for the purpose of securing tires by a certain device are parallel with the axle, and the sides are cut at right angles with that; the insertion of the knife proved that the angle on the flange of the tire was an obtuse angle, because if the flange of the tire was a right angle, it would coincide with the side of the wheel.

Cross-examined:

I cannot tell, by mere visible inspection, whether my patent is in use or not; the effect of use on tires would be to close up the space between the tire and the wheel-centre; it requires a test to tell whether my patent is in use or not; the engines I have referred to were running pas-
53 senger trains on the Lehigh Valley Railroad; I did not look for other signs of ownership; Mr. Asa Packer gave me a pass on the road to examine the engines and see if they had not my patent on; I mean that I cannot tell whether my patent is in use without a test when the wheels are on the engine and in use; when I made the

examination Mr. Austin Moore, of Scranton, was with me; I saw no wheels or tires like Exhibit B, but I did not examine all the company's engines, only those in Easton at the time; there were engines there which had not my patent on.

EDWARD MELLON.

Sworn to and subscribed before me this 25th day of October, A. D. 1872.

CRAIG BIDDLE,
Examiner.

WILLIAM C. CONWELL sworn:

My age is thirty-eight past. I am by trade a machinist. Occupied at present as foreman of the turning shop of the Delaware, Lackawanna and Western Railroad at Scranton. Have been in their employment seventeen years in that department, but not always as foreman. I have been acquainted with the method of adapting tires to the wheels of locomotives for twenty years. I am acquainted with Mellon's patented improvement. I never saw a tire with an internal flange put on a locomotive wheel prior to Mellon's improvement. Where a tire on a wheel is in use, it will stretch or raise in the centre from continual
54 rolling or hammering on the rails. From what I observe, this happens in a less degree with steel tires than with wrought iron. This paper (marked Lisk) correctly represents the stretching of an old wrought-iron tire made in the old way, and secured with nuts or bolts, or rivets. An old tire, made without flanges and secured by rivets, would, when in use, crush the edges of the wheel centre so as to render it unfit for use for the same sized tire. The wheel would have to be ground down to fit a smaller tire or else the crushed part lined. In practice the wheel is generally turned down. In the majority of cases, the tire which is taken off is useless for that purpose. The stretching of the tire also breaks the rivets or pulls them through. With such an old tire, if it became loose, the engine could not be run with safety. With Mellon's patent, if the tire became loose, the engine could be run with perfect safety.

(Objected to by Mr. Campbell as not proper evidence in rebuttal.)

Q. 1. State how long an old tire, such as described, could be used on an engine as compared with Mellon's tire.

A. I think about one third of the whole time in favor of Mellon's, that is, an old flat tire. I have known instances when a new tire without flanges and secured by rivets would crack in a few days after it was put in use on the engine. I think this would happen in about three per cent. of the engines turned out in a given time. This might happen from a defective material or in the workmanship, which it would be im-
possible to detect. The majority of these breakages occur, in my
55 opinion, from the construction of the tire. With Mellon's patent the tire will also raise in the centre and will have the effect to loose it, but not near so soon. I mean not absolutely loose to necessitate the taking of the tire off the wheel. In stretching, the flange tightens against the wheel centre and holds it in place. The stretching of a tire provided with an internal flange at the same angle as the edge of the wheel will produce one of three results, viz: It will drag the tire from its seat, break off the flange, or embed itself in the edge of the wheel. As it will not produce the first or the last result, it will necessarily break off the flange, in my opinion.

Q. 2. In Mellon's patent, what is it holds the tire on to the wheel?

A. It is the flange aided by the shrinkage. When the tire becomes

loose it is the flange entirely, aided by the outer flange bearing on and against the rail.

Cross-examined:

I first became acquainted with Mr. Mellon's invention, I think, early in 1865. Prior to that time I saw an attempt made to attach an old tire without the aid of bolts or screws, but it failed, and they had to abandon it.

(Objected to.)

This was at our own shop; but I don't know how long before. I never saw a projection left upon a tire for the purpose of guiding the tire in shrinking it on a wheel before Mr. Mellon's invention. After a tire has been used and raises in the centre, it presses upon the edges and it becomes difficult to remove the tire entirely when it is raised to a
56 considerable distance. I am not acquainted with the engines on the Lehigh Valley road.

W. C. CONWELL.

Sworn to and subscribed before me this 25th day of October, A. D. 1872.

CRAIG BIDDLE,
U. S. Commissioner.

Krupp's book shown witness, who says he thinks they have a copy at the Delaware, Lackawanna and Western Railroad office, although he never saw it.

CRAIG BIDDLE,
Examiner.

57 SEPTEMBER 23, 1873.

WILLIAM C. CONWELL (recalled by Mr. Fenton):

I have read the letters patent of Mr. Mellon, the complainant; I am familiar with them; I have also read and am familiar with Hodge's patent (Exhibit B).

Q. State whether or not there are any points of similarity, and, if so, what, in the invention shown in Hodge's patent and that of Mellon, the complainant.

(Mr. Campbell objects to question.)

Mr. Fenton desires it to be understood and noted that Mr. Conwell is now called as an expert.

A. I can find no similarity in any point in the inventions; neither in principle of construction, mode of operation, or objects to be accomplished or attained.

Q. Please state in detail the difference in principle of construction between the two inventions mentioned.

A. Mellon's invention consists in the providing of wheel-centre with a single flange, so arranged that in connection with the external or usual flange on the tire, it will keep or retain the latter on the wheel; Hodge's invention is a novelty in the construction of car wheels, and has no reference anywhere to the securing of tires; Mellon's wheel-centre is in the form of a cylinder; the outer periphery of Hodge's segments which form a part of his wheel-centre is in the form of a cone with an annular groove sunk in them, or with two flanges; a cylinder is not a cone,
58 neither in geometry nor in mechanics, and the one will not answer where the other is required; Mellon's single flange would not secure

a tire on a conical wheel, and you could not put Hodge's tire on a wheel with a grooved periphery, unless that wheel was capable of being contracted and expanded in the manner described in Hodge's patent papers; an elastic wheel, such as Hodge describes, would be useless for carrying purposes on a railroad; Hodge claims in his papers that his wheel will yield to pressure in every direction; one direction would be perpendicular or downward onto the axle; the weight of the car and its load would compress the rubber segments or ring below the axle, allowing that above to expand and compel motive power to force the greater elastic bulk above the axle through the less space below the same.

Q. You have stated that Hodge's tire could be put upon such a wheel-centre only as would be capable of contraction and expansion; is this principle true of all wheels for locomotive use where either the tire or the wheel has two flanges upon the same face?

A. It is true if the flanges are of any considerable depth and are made of cast-iron.

Q. Please state whether or not, in your opinion, the invention described in Hodge's patent is practicable, and the difference, if any, between it and Mellon's in principle of operation and in point of utility.

(Mr. Campbell objects to this question.)

A. I think it is not practicable; I am strengthened in that belief, from the fact that it has never come in general use; I never saw one in use myself, nor did I ever hear any one say that they did; I have
59 already described the mode of operation of Hodge's wheel, and was about to answer the last part of the question, the point of utility; we could not turn up the tire on a wheel such as Hodge describes, because of its elasticity, and wheels for locomotives must be turned up true after having been in use; with Mellon's single flange we can use the tire longer than with any other device, because of the strength given to the tire in a lateral direction by the flange on the wheel.

(Objected to by Mr. Campbell as not rebutting testimony.)

Q. Please state whether or not your answers already given apply in the same manner to the other form of Mr. Mellon's invention where the flange is upon the tire instead of upon the wheel.

A. They do; the principle and the results obtained are the same in both forms of Mellon's invention, as shown in Exhibits B and C; it is simply a transfer of the shoulder or stop from one side of the wheel to the other; this may not appear to be so but it is the fact that the wheel stops the tire in both cases; in putting Mellon's tire upon the wheel, it is the tire which is expanded and not the wheel.

Q. State whether or not, in Mellon's improvement, the tire can be readily taken off or put upon the wheel-centre without injuring the latter, and is such the case with Hodge's wheel?

A. In the case of Mellon's improvement it is more readily taken off than a tire secured by any other device, because there is nothing in the way except its own shrinkage, and if broken or loose even that is re-
60 moved; we can repair or replace a tire with Mellon's improvement without taking the wheels from under the engine by simply raising the flange above the rail, and then take it off; if Hodge's wheel became loose from the tire it would break off his outside flange, allowing the segments, both metal and rubber, to fly off; in short, the wheel would go to pieces and the engine have to stop; if Mellon's tire became loose from the wheel there would be no such effect; it would not cause the stoppage of the engine or break the tire or the wheel if not run unnecessarily long in that condition; I have known engines run two

weeks with the tire loose, Mellon's improvement being on; I have known them to run about a hundred miles with the tire broken.

Cross-examined by Mr. CAMPBELL:

Hodge's patent could be used upon a locomotive-wheel as well as upon a car-wheel; it would be useless on either; by a "considerable depth," in answer to Mr. Fenton's question, I meant a greater depth of flange than the iron would be capable of expanding; to expand a cast-iron chilled rim or tire would be to insure rendering it useless by softening the chill; the difficulty in removing Hodge's tire lies in the outside flange; I never knew, prior to Mr. Mellon's invention, tires to be attached to locomotive-wheels successfully by shrinkage only; I mean by "successfully" so that they could not be worn as thin without Mellon's improvement as with it; I have seen, prior to that time, the thing tried; I remember trying it about eight years ago; it may have been tried prior to that time.

61 Re-examined by Mr. FENTON:

Q. State what the effect would be on Hodge's wheel, when the tire rose in the centre from use.

A. If the tire rose in the centre, it would have the effect to break or crush one or perhaps both flanges on the wheel, or rather the segments of the wheel, by concentrating the weight on them; such would not be the effect with Mellon's wheel and tire if properly constructed.

W. C. CONWELL.

EDWARD MELLON recalled:

Q. Please state when you made your drawings and models, prior to obtaining your letters patent in this case.

A. I made the models about the latter part of July, or first part of August, 1865, and the drawings about the middle of August, 1865.

Q. Please state what you did with those models and drawings, and how you fix the date.

A. I sent a tracing of the drawings to Munn & Co., of New York, and received an answer from him considering them patentable; the letter was dated August 21st, 1865; I examined the original letter to-day, which has refreshed my memory.

Q. Your patent states that the specification was signed on the 9th day of September, 1865; is that the correct date?

A. To the best of my knowledge that is the correct date; I made the oath of invention on that day in Munn's office, in the city of New York.

EDWARD MELLON.

62 Complainants offer in evidence a certified copy of file wrapper, in the matter of the letters patent granted Edward Mellon October 2, 1866, No. 58447, for improved mode of attaching tires to wheels of locomotives; showing that the application for said patent was filed in the United States Patent Office by the complainant October 6, 1865, (Exhibit C B.)

63 *Defendants' testimony.*

WILLIAM TOOTHE sworn.

I am the agent for the William Boutcher, the steel-works, Lewistown, Pa.; am familiar with the tires of locomotive wheels; have been for thirteen years; I was at one time with Thomas Prosser & Co., of New York, agents of Krupp's steel-works, Essen, Rhenish-Prussia; I know

the book, Exhibit G, very well; it was in this country in 1862; Thomas Prosser and Son had a large number of them; they were for general circulation; we sent them to nearly every railroad in the United States; there was no difficulty in obtaining a copy from Prosser; any one writing to me or to them, could get a copy; they were pretty generally distributed within a year after we received them; I am familiar with Mr. Mellon's patent; I paid special attention to it at one time.

Q. Look at the drawings attached to the plaintiff's patent and state whether, prior to its date, you saw any tires embracing substantially the plaintiff's claim.

A. Yes, sir, I did; in 1861 or 1862, we had (Prosser & Son) a tire sent by Mr. Krupp to the New York agency, and that tire has the identical fillet on which is the claim of Mr. Mellon; by fillet I mean the
64 projecting flange on the face of the tire. Exhibit E is precisely like the tire sent us by Krupp's; the angle formed by the projecting flange was a right angle on Krupp's; this tire was first placed at the front door of Prosser & Son, Platt street, New York, so that every one entering the store had to walk through it; it was of extraordinary size, being something over eight feet in diameter; it is now in 15 Gold street, fastened on the Platt-street side of the building, on the wall; the tire was first exhibited at Platt street, before the door, in 1862; it was open and uncovered; every one could see the fillet.

(The preceding answer and question objected to, as relating to a defence not set out in answer by Mr. Fenton.)

WITNESS resumes: It was used as an advertising card, being unusually large.

Q. As an expert, what is your opinion of the value of Mr. Mellon's improvement?

(Objected to by Mr. Fenton.)

A. I don't consider it of any value at all; having gone through the subject of putting on tires for the last ten or twelve years, and consulted with a great number of railway master mechanics, I consider shrinkage alone as of more value than any other plan or device.

Q. Does the presence of the fillet diminish the chance of the tires becoming loose?

(Objected to by Mr. Fenton.)

A. That would depend upon the blow it got; for general wear I don't think it would contribute any more to the safety of the tire than a bolt or slot which is sometimes used besides the shrinkage; the Krupp
65 tires, now imported into this country, have not the fillet; they are imported plain, generally, as they come from the forge and rolls.

Q. Look at this circular, Exhibit X, and state whether you know it having been issued by Prosser & Co.

(Objected to.)

A. I can't recollect.

Cross-examined by Mr. FENTON:

The Boutcher & Co. steel works at Lewistown manufacture steel tires. I have been in their employ since 1871. Two years before that I was at the Boutcher Steel works at Nicetown. I have no practical knowledge as a manufacturer of tires. My knowledge arises from my being an agent for the sale of them from these different manufacturers. I was with Prosser from the winter of 1861-'2 to 1869. Prosser & Son supplied the different railroads with tires during those years; they all came from Krupp's. There were no tires imported with the fillet, except the speci-

men I have spoken of. We never took any orders for any tires with an internal flange or fillet. I have seen from two to three hundred copies at a time of (book, Exhibit H), Krupp's book. When we got out of them we sent for more. We used them as a card, getting them in boxes two or three hundred at a time. I have distributed a number personally. They were circulated as an advertisement, and to show the different kinds of tires which had been rolled by Krupp at different times. Prosser & Son sold a combination wheel with axle; wheel and tire, all complete for the track. These were intended for tenders. I fix the
66 date of the receipt of Krupp's book by its being the first year of my advent into the firm. I am positive I distributed these books the first year I was with the firm. I had entire charge of the tire department. It was distributed for the purpose of exhibiting the usual flange, which goes on the rail. From the parties who sent us orders for tires we always received and delivered to them the tires in the rough state; that is, perfectly plain on the inner surface. Steel tires were first generally introduced in 1863. I never acted for Prosser or Krupp in Europe. I have no personal knowledge of the use of the tires described in that book, on the respective railroads mentioned therein. The rolled tires are the tires in the rough state, just as they come from the forge and rolled. By ready turned tires is meant tires turned in the lathe, and finished ready for the wheel. The tires in Krupp's book, marked A, are the rolled tires; those marked B, are the ready turned tires, and those not marked with either letter, I should think would be in the rough; I can't tell, but I should think so. Exhibit E is a perfect model of the tire, without regard to the scale, which I spoke of, the exhibition tire. It was received before the books and before I came to Prosser's. I don't know that it came from Krupp, except that he spoke of it in his letters to the firm. Speaking from recollection of the letters of Mr. Krupp, I should say that he said the tire was rolled in 1850, and exhibited in 1851. (Last sentence objected to by Mr. Fenton as not responsive to question.) The correspondence with Mr. Krupp about the fillet or flange was after Mr. Mellon's patent was taken out. I can't tell the exact time. I reside at Linden, New Jersey; my office is in New York. The large exhibi-
67 tion tire was placed in front of Prosser's door, 28 Platt street, and fastened at the base to an iron grating, and at the top by a stay from the wall, and people walked through it to go into the store. The tire is now fastened to the wall by iron clamps in Prosser's store, No. 15 Gold street. The ordinary flange side is against the wall; I don't know the exact dimensions. To the best of my recollection it is somewhat over eight feet in the internal diameter. It is not a working size for use in this country.

Q. Can you, and if so, will you please send to the examiner the dimension of the exhibition tire at Prosser's?

A. I will do so. There was no wheel centre exhibited with the tire; only the tire. All regular tires are put on by shrinkage, and sometimes bolted besides. If the Mellon tire became loose from the wheel the projection would hold it on the wheel, unless it got an extraordinarily heavy blow, but generally speaking it would hold it. I remember selling Krupp's tires for Prosser to the Delaware, Lackawanna and Western Railroad Co. I have sold so many to them I can't recollect the price. I think it was from fifteen to nineteen cents gold per pound. It was during the superintendency of Watts Cooke; I can't fix it more precisely. I should say from about 1864 to 1868; somewhere along there. We began about 1864 to sell to them. They were Krupp's steel tires. They were all plain on the inner surface. I presume Watts Cooke got

a copy of the book of Krupp; I am pretty positive as to that. Our plan was to send the book to each road, one or two copies, and more if
68 asked for. I should think Mr. Cooke got one about the time we first received his orders. He often called on me at New York, at my place. Then we would show him tires and drawings, and anything in steel in his line produced by Krupp. The tires and drawings we showed Cooke were the same that we showed others. We had a printed form of instruction as to how to put on the tires from Krupp. This we reprinted for general distribution. It was our custom to send a copy of these with every invoice. They were instructions with regard to shrinkage. The shrinkage would be one ninety-sixth of an inch to each foot of the diameter of the wheel. I know Mr. Mellon, the complainant; have since 1864 or 1866. I am positive of the date I went to Prosser & Co. I think I first heard of Mr. Mellon's invention when I met him in 1864 or 1866, from Mr. George L. Dixon, now president of the Dixon Manufacturing Co. He asked me if I knew anything about it; I said no. Then Mr. Thomas Prosser, sr., and I went over the patent together. About that time I was shown a template or drawings of Mellon's tire by either Dixon, Mellon, or Cooke. The template shown to me illustrated the cross-section of Mellon's patent.

WILLIAM TOOTHE.

Sworn and subscribed before me this 30th day of October, A. D. 1873.

CRAIG BIDDLE,
Examiner.

69 NOVEMBER 13, 1873.

Present, Messrs. Campbell and Fenton

Mr. Campbell offers in evidence a book entitled "Railway Machinery, a treatise on the mechanical engineering of railways, embracing the principles and construction of rolling and fixed plant; illustrated by a series of plates on a large scale, and by numerous engravings on wood, by Daniel Kinnear Clark, C. E.;" published by Blackie and Son, Glasgow, Edinburgh, London, and New York, 1855, being volume second—plates, and particularly plates 35 and 42, marked "third class carriage," and "open box wagon," respectively.

Mr. Fenton objects to the foregoing exhibit as setting up a defence not mentioned in the answer.

Mr. Campbell further offers a book entitled "Minutes of Proceedings of the Institution of Civil Engineers, with abstracts of the discussions, volume 23, session 1863-'4, edited by James Forrest, Assoc. Inst. C. E., secretary;" published in London by the institution, 25 Great George street, Westminster, S. W., 1864—produced from the library of the Franklin Institute, No. 2934, second class, 36 A., pages 411 to 442, and plate 8.

Mr. Fenton makes the same objection as before.

J. I. KINSEY recalled:

I bought "Clark's Railway Machinery," above referred to, of a
70 book agent, in Trenton, New Jersey, during the years 1855 and 1856; it came in numbers.

(Same objection as to book.)

I know the engine "White Hall"; it was built in Taunton, Massachusetts, for the Lehigh Valley Railroad Company; it was received in June, 1870; the tires have not been removed since the company have owned her; it is not possible to determine, without removing the tire,

whether there is a fillet such as claimed in Mr. Mellon's p t
not be determined without that whether it is ~~curved~~ or an l
without removing the tire or a portion of it. I know the e E. A.
Packer"; it has a square shoulder on the tire, as represented in model E. I know the engine "Reliance"; it has the same fillet as the "E. A. Packer"; I have never seen any engine where it would be possible to insert the blade of a knife between the tire and the wheel-centre or the side, because the tire is forced close against the wheel-centre so close as not to permit the passage of a knife-blade.

Cross-examined by Mr. FENTON:

I examined the "Reliance" and "E. A. Packer" about a month ago; those engines have the tires on now that were put on the following dates: "E. A. Packer," October, 1865, "Reliance," September, 1869, "White Hall," June, 1870; the "E. A. Packer" and "Reliance" have the steel tire with the shoulder or fillet as in defendants' brass Exhibit E.

Re-examined:

The tires on the "Reliance" and "E. A. Packer" were put on the wheels at the company's shops, South Easton.

71 Q. Please look at printed circular, headed "Krupp's cast-steel tires," and state from whom you received it.

(Objected to by Mr. Fenton, for the reason heretofore stated, and as irrelevant.)

A. I received them from Krupp's agents, Thomas Prosser & Co., between May and July, 1865; I may have received others, but this is the only one I have preserved; I gave it to my men, who put the tires on to serve as a guide in shrinking.

Recross examined:

I fix the date of receiving this circular by the date I received the tires; I asked for instructions how to shrink them on the wheel-centres; I received the bill of the tires in May and July, 1865, but we put no tires on the wheels till September, 1865; we put on smaller tires previous to that; I can't swear positively that the circular was not received July and September, 1865; all the tires we received from Prosser came plain, that is, without any shoulder or fillet on the inner surface; we then bored them out; I have not examined the original bills, but I have a copy of them, made by a clerk, and in that way I fix the date; the original bills come to me; I have a copy made in a book, and send the originals to the treasurer.

J. I. KINSEY.

Sworn and subscribed before me this 13th day of November, A. D. 1873.

CRAIG BIDDLE,
Examiner.

72 Mr. Campbell desires it to be entered that he here closes for the respondent.

Complainant offers letters patent of the United States to Nehemiah Hodge for improvement in railroad car wheels, No. 8979, dated June 22, 1852.

NEW YORK, 1 *Nov.*, 1873.

CRAIG BIDDLE, Esq.:

DEAR SIR: Below I give you the measurements of the tire referred

o in my evidence of yesterday, in the Mellon's patent case, as requested by the attorney for the complainant.

Inside diameter of tire, eight feet one inch (8 1″).

Outside diameter of tire, eight feet six inches on tread (8 6″).

Width of tire, five and one-half inches (5½).

Thickness of tire, two and one-half inches (2½).

The "fillet" or internal flange measures as follows: One and one-quarter inch wide (1¼), and one inch deep (1″). See enclosed tracing.

Yours, very respectfully,

WILLIAM TOOTHE.

73 *Krupp's cast steel tires.*

DIRECTIONS FOR SHRINKING THEM ON THE WHEELS OF LOCOMOTIVES.

The precautions necessary to be observed in shrinking these tires on to the cast-iron wheels are very different to those which obtain in shrinking wrought iron ones on to the same.

To illustrate this, let us examine the amount of shrinkage allowed for wrought-iron tires.

Holly, in his valuable work, "American and European Railway Practice," states at p. 185, that "engine tires of iron are often stretched one inch, in a length of sixteen feet," which is equal to one in one hundred and ninety-two. Now, in order to get a wrought-iron tire which requires so much stretching, over the wheel, it must be heated 745° F., allowing 1° to cause an expansion of 1 in 143,000; and if tires are heated to 884° or "red in twilight," we have probably the lowest practical heat usually given.

It need not, therefore, create any surprise when wrought-iron tires burst during very cold weather, or even in the process of shrinking them on the wheel.

On the other hand, if a considerable amount of shrinkage is not allowed, then they are sooner liable to become loose from the effect of their hammering upon the rail; particularly, under heavy engines, the weight of many of them being sufficient to crush any iron that ever was made.

If the tires and the rails were incompressible, the bearing would be but a mere line; but, as it is, iron will not bear more than about 9,000 lbs. per square inch without being in danger of crushing.

Cast steel will certainly bear 5 times this amount of crushing force without injury, and as its elasticity is twice and a half that of wrought iron, the fact of its immense superiority is at once apparent.

Therefore, in shrinking on Krupp's cast-steel tires, it is only necessary to allow one ninety-sixth of an inch for each foot of the diameter of the wheel, or one in eleven hundred and fifty-two, which is one-twentieth of an inch for a wheel of 57.6″ diameter.

74 Steel expands 1 in 157,200 by each degree (F.) of heat; hence 137° F. is all that is required to expand it 1 in 1152. Practically, however, we may adopt as a standard the fusing point of tin or 442° F., as an all-sufficient temperature to expand the cast-steel tires without any danger of over or unequally heating them, for the latter must be carefully guarded against. Now, as to the strain put upon the cast-steel tire, it is difficult to calculate; but, if we assume the cast-iron wheel to be compressed as much as the cast-steel tires are expanded by a shrinkage of 1 in 1152, that strain will amount to 12,586 lbs. per square inch, which is about one-tenth of its ultimate cohesion.

A climatic fall of 100° F., will increase the strain upon the cast-steel tire to 12,987 lbs. per square inch, for the steel will shrink 1 in 1570, while the cast-iron wheel will shrink but 1 in 1620; while, on the other hand, an increase of temperature of 100° F., will merely reduce the strain in the same ratio.

If water is applied for the purpose of cooling the tires, it should be done with as much uniformity as is practicable.

The best way of fastening the tires upon the wheel is to turn a stop or fillet upon the tire, with a corresponding recess upon the wheel, on the outside, and rivet the former over the latter, upon the inside.

If, however, screw-bolts are preferred, they should be screwed into the rim of the wheel, leaving a plain pin only, about half an inch long, to enter the tires.

THOMAS PROSSER & SON,
28 *Platt Street, New York,*
Sole Representatives in America of Fried. Krupp,
Essen, Rhenish Prussia.

75 And afterwards, to wit, on the 5th day of October, A. D. 1874, this case came on for argument, and being fully argued by counsel for the respective parties, the court made the following decree, to wit:

In the circuit court of the United States in and for the eastern district of Pennsylvania, April sess., 1868. No. 2. In equity.

EDWARD MELLON
vs.
THE LEHIGH VALLEY RAILROAD COMPANY and Asa Packer, president of said company.

And now, to wit, this seventh day of October, 1874, this cause having been brought to a final hearing upon the pleadings and proofs, and having been heretofore argued by counsel for complainant and respondents respectively, and the said counsel having been fully heard
76 thereupon, and the same *having been fully heard thereupon, and the same* having been duly considered by this court, it is found and hereby ordered, adjudged and decreed, that the letters patent of the United States for improvement in locomotive wheel-tires granted to Edward Mellon, October 2nd, 1866, are valid, and that the title thereto is duly vested in the complainant.

And it is further ordered, adjudged, and decreed that the said defendants have violated and infringed upon the exclusive rights of the complainant as vested in him under and by virtue of said letters patent, as in said bill of complaint alleged, and as set forth, by making
77 and using tires and wheels for locomotive engines made and applied in imitation of the improvements set forth in said letters patent, without any right or license so to do.

And it is further ordered, adjudged, and decreed that the complainant do recover of the defendants the profits and gains made and received by them, the said defendants, in consequence of the infringements and violation of the exclusive rights of the complainant, together with the costs of the prosecution in this cause expended by said complainant; and further, that it be, and is hereby, referred to Robert N. Willson, esq., as master, to compute, ascertain and assess said profits and gains, and to take the proofs and report the same to the

78 court, with leave to either party to move the court, upon notice, for special instructions to said master in reference thereto.

And it is further ordered, adjudged, and decreed that a writ of perpetual injunction be issued in this suit against the said respondent, the said Lehigh Valley Railroad Company, enjoining and restraining the said corporation defendant, its officers, agents, workmen, servants and employees, and each and every of them, from making, constructing, using and applying, or vending to others to be used and applied, any improved locomotive wheel-tires made, constructed, used and applied in the manner and for the purpose mentioned and described in the specifications attached to the said letters patent.

By the court.

79 (Endorsed:) U. S. C. C., April sess., 1868. Mellon vs. Lehigh Valley R. R. Co. et. al. No. 2. In equity. Decree. Filed 5th October, 1874.

80 *Master's minutes.*

United States circuit court. In equity.

EDWARD MELLON
vs.
LEHIGH VALLEY RAILROAD CO.

And now, January 21, 1875, on motion of complainant's counsel it is ordered that the defendants produce before the master a statement or account, verified by affidavit, of the number of locomotive wheels or tires similar to the improvements patented to complainant—Exhibits B and C, the models offered in evidence in the above entitled case—which have been made, purchased, used, or sold by them since the date of complainant's letters patent, viz, October 2, 1866, showing the date of such manufacture, purchase, or sale, and the period of such use in each case, and discriminating between wheels or tires similar to Exhibit B and those similar to Exhibit C.

SEPTEMBER 17, 1875.

Present, Messrs. Fenton, Campbell, and Mellon, the plaintiff.

The defendants, in pursuance of the order made on January 21, 1875, produced two statements, which are marked Exhibits Mellon A and B.

81 EXHIBIT A.

LEHIGH VALLEY RAILROAD COMPANY.

Statement of locomotives provided with a square shoulder on tire.

No. of locomotive.	Date when first so provided.	No. of wheels so provided.	Until what date so provided.	No. of locomotive.	Date when first so provided.	No. of wheels so provided.	Until what date so provided.
2	July, 1872	4	Until now.	40	May, 1874	6	Until now.
4	Oct., 1874	4	"	42	Aug., 1867	6-3	"
5	April, 1869	4	"	43	April, 1867	6	"
8	Jan., 1867	4-3	"	44	May, 1868	6	"
9	Sept., 1869	4	"	45	March, 1868	6-3	"
10	Nov., 1874	6-3	"	46	Oct., 1874	6	"
11	Oct., 1865	2	"	47	Nov., 1872	4	"
12	Aug., 1872			48	Aug., 1872	4	"
13	Oct., 1873	4	"	49	March, 1868	6	"
14	July, 1869	4	"	55	March, 1873	6	"
15	Jan., 1867	6	"	57	Feb., 1869	6-3	"
16	Dec., 1872	6-3	"	71	June, 1872	6-3	"
17	Sept., 1869	8	"	81	Feb., 1874	10-3	"
19	Feb., 1868	4-3	"	83	Aug., 1872	6	"
20	Feb., 1867	8-3	"	84	Feb , 1868	4	"
21	Jan., 1866	8	"	86	Sept., 1870	6	"
22	July, 1869	6	"	95	Dec., 1870	6	"
23	Jan., 1873	6	"	96	Dec., 1870	6	"
24	March, 1869	4	"	136	Nov., 1869	4-3	"
25	Jan., 1874	2	"	138	July, 1870	4-3	"
26	Jan , 1869	6	"	139	Sept., 1870	4	"
27	April, 1866	6	"	140	Sept., 1870	4	"
28	Oct., 1866	6	"	148	Dec., 1870	4-3	"
29	Nov., 1873	6	"	159	April, 1871	4-3	"
30	Nov., 1869	6	"	173	Oct., 1871	8-3	"
31	July, 1866	6	"	174	May, 1872	8-3	"
32	1869 or 1870	2	"	183	May, 1873	8-3	"
34	Feb., 1872	6-3	"	184	Nov., 1874	6-3	"
35	July, 1872	6-3	"	189	Sept., 1873	6-3	"
36	June, 1873	6-3	"	190	Feb., 1874	6-3	"
37	March, 1866	6	"	*223	Sept., 1868	4	Jan., 1874
38	Nov., 1869	6	"	*298	May, 1870	4-3	Jan., 1874
39	Nov., 1867	6	"				
		174		65		354	

*Sold to P. and N. Y. Co., January 7, 1874.

24 engines; 148 tires.

The engines marked with a figure (3) I believe to have been fitted with tires more than 2¾ inches thick; all the others, I believe, from all the information I can gather, had the tires turned down to less than 2¾ inches before putting on.

(Signed) H. S. GOODWIN.

SEPTEMBER 27, 1875.

82 EXHIBIT B.

Names of engines named in Exhibit A.

LOCOMOTIVES—LEHIGH VALLEY RAILROAD COMPANY.

No.	Name.	No.	Name.
2.	Asa Packer.	11.	E. A. Packer.
4.	R. H. Sayre.	12.	New Jersey.
5.	Delaware.	13.	Pennsylvania.
8.	Pacific.	14.	Catasauqua.
9.	Reliance.	15.	Lehigh.
10.	Baltic.	16.	Atlas.

17. Beaver.
19. Defiance.
20. Champion.
21. Bushkill.
22. Saucon.
23. Monocacy
24. Lilliput.
25. Easton.
26. Mauch Chunk.
27. Bethlehem.
28. Allentown.
29. Slatington.
30. Sugar Notch.
31. Parryville.
32. Lehighton.
34. Messenger.
35. Mercury.
36. Meteor.
37. Penn Haven.
38. White Haven.
39. Nescopee.
40. Nanticoke.
42. Neptune.
43. Quakake.
44. Nesquehoning.
45. Tuscarora.
46. Algonquin.
47. Antelope.
48. Reindeer.
49. Centralia.
55. Seminole.
57. Aramingo.
71. Mt. Carmel.
81. Ant.
83. Advance.
84. Anthracite.
86. Newport.
95. Serida.
96. Nevada.
136. Senator.
138. Coleraine.
139. South Easton.
140. Glendon.
148. Evangeline.
159. Ario Pardee.
173. Keystone.
174. Kentucky.
183. Onoko.
184. Comet.
189. H. S. Goodwin.
190. Alpo.
*223. W. W. Longstreth.
*228. Weatherly.

83 Query. Have the company any engines that have now or have had since the patent any flange on the wheel to fit a recess on the tire?

No.

How many engines (give their numbers and names) have the Lehigh Valley Co. which were built by contract (and not included in list), and concerning which Goodwin says he cannot say as to what tires they have on; by whom were they built and when?

99. See Exhibit D.

Does the list cover engines of the P. & N. Y. R. R. Co.?

No.

We are informed this road is leased by and under exclusive control of Lehigh Valley Co.

Not so.

Have any such tires been put on engines on new road from Easton to Amboy?

None except those included in exhibit.

Does the list cover engines used on Beaver Meadow division, and what divisions besides the main road are covered by it?

It covers all divisions of Lehigh Valley Railroad.

How many of the engines named in the list have had more than one set of the flange tires put on them since October, 1866? Which of the engines, and how many times renewed? State number of tires renewed in each case.

None replaced.

Has the company, since November, 1874, replaced any tires with

*Sold to P. and N. Y. Co., January, 1874.

flanges upon engines named in the list to supply any worn or broken since then?

Not any.

How many of the tires named in the list are on driving wheels, and how many on pilot wheels? (Give name of engine in each case.)

All on driving wheels.

Were any of the tires named in the list over 2¾ inches thick when first put on, and how many? And also the general diameter of the driving wheels of those engines named in the list?

4 to 4½ feet.

84 EXHIBIT D.

No. of engine.	Built by—	When put on road.
3	N. J. Machine Co	Feb., '74
6	R. I. Loc. W	April, "
18	"	" "
33	Baldwin	June, 74
41	"	Nov., "
50	"	Oct., '65
51	"	" "
52	William Mason	Jan., '66
53	"	" "
54	Baldwin	Feb., '66
56	"	Jan., '74
58	"	March, '66
59	McKay & Aldus	April, "
60	"	" "
61	"	May, "
62	"	June, "
63	Baldwin	July, '63
64	"	" "
65	"	" "
66	"	April '64
67	Jas. A. Norris	May, '64
68	Baldwin	Sept., '65
69	D. B. Grant & Co	Jan., '65
70	"	" "
72	Baldwin	Sept., '65
73	"	Nov., '65
74	"	Dec., "
75	"	May, '66
76	"	" "
77	"	" '67
78	"	June, "
79	"	July, "
80	"	Aug., "
82	E. S. Norris	Sept., "
85	Baldwin	Feb., '68
87	"	Jan., "
88	"	Sept., "
89	"	" "
90	"	" "
93	"	July, "
94	"	" "
97	"	Jan., '69
98	"	" "
99	"	" "
100	"	" "
122	"	July, '74
123	"	March, '69
124	"	July, '74
125	William Mason	June, '69
126	"	July, "
127	Baldwin	Aug., '69
128	"	" '74
129	"	" "
130	"	Oct., '69
131	"	Oct., '69
132	"	Nov., "
133	"	" "
134	"	" "
135	"	" "
137	"	Oct., '74
141	"	" "
142	"	Nov., "
143	"	Feb., '70
144	"	" "
145	"	" "
146	"	" "
149	William Mason	April, '70
150	"	May, "
151	"	" "
152	"	June, "
153	"	" "
154	"	July, "
155	"	" "
156	"	Aug., "
157	"	Sept., "
158	"	" "
161	Baldwin	March, '71
162	Mason	Nov., '74
163	"	Aug., "
164	"	" '71
165	Baldwin	Feb., '72
166	"	" "
167	"	" "
168	"	" "
169	"	March, "
170	"	April, "
171	"	Nov., '71
172	"	" "
177	Mason	Sept., '74
178	"	" "
191	"	Aug., '73
192	"	" "
193	"	" "
194	"	Oct., '74
195	"	Sept., '73
196		" "
197	"	Oct., '74
198	"	" "
199	"	Nov., "

Total number of engines, 99.

85 The counsel for complainant, in proceeding to offer proofs to show the net profits or gain to the defendants from the use of the plaintiff's invention, states that in view of the fact that from the nature

of the invention such profit, value, or gain consists of elements such as ease and economy and saving of time in its manufacture, application and repair, additional durability from its form, great safety in use, and other items of advantage over other forms of locomotive tires and wheels, and methods of securing the same to the wheel, as testified to in the deposition of Mr. Conwell, page 47, before the examiner, such items of advantage, gain and profit being incapable of accurate estimation in dollars and cents, now proposes to prove that the plaintiff, since the issue of the letters patent to him, has publicly offered to license parties to use his invention at a fixed royalty, and entered into contract with different parties, builders of engines and railroad companies, who, in view of the value of the invention, and of the gain, profit, and advantage derived from the use of the same on the engines made by them, have been willing to allow therefor and thereout, and have allowed and paid to the plaintiff therefor and thereout, certain sums of money, viz, the royalty price aforesaid, for the privilege or license to apply and attach to and upon their engines, and use until finally worn out tires and wheels constructed in accordance with said letters patent, at the following rates:

$10 for each tire on a driving wheel of over 40 inches diameter.

$5 for each tire on a pilot wheel of less than 40 inches diameter.

$12 for each tire on a driving wheel where the tire is 2¾ inches or over in thickness.

And having proved this, will ask the master to assess and report the royalty or license rate, so fixed by complainant and paid by others as aforesaid, as the amount of profit or gain to be paid by defendants
86 to plaintiff under the decree, for the use upon their road of the wheels and tires made by defendants in infringement of plaintiff's patent, and used by them upon the engines named in the accounts produced by them.

EDWARD MELLON, being called on his own behalf and duly sworn, says:

I am the plaintiff in this case; shortly after the patent mentioned in this case was issued to me I put out a circular containing a mention of the invention and of the prices at which I would license parties to use it; I have never issued any other circular on the same subject.

(Paper handed to witness marked Exhibit Mellon C, and he says:)

This is a copy of the circular spoken of by me; I have licensed builders of engines to use my improvement; it was in either 1866 or 1867—December or January—I don't remember which; I made known the prices named in the circular to the Dickson Manufacturing Company of Scranton, Pennsylvania, at that time; they are builders of locomotive engines; they, at that time, paid the price I named for the tires which they had used during the time that my application for the patent was pending at Washington; they have continued to use my invention, and to pay the same prices for its use from that time to the present with my consent; the prices were ten dollars per tire for tires over forty inches in diameter, and five dollars for tires under forty inches in diameter, and twelve dollars when the tires over forty inches in diameter are two and three-quarter inches or more in thickness; the Dickson Manufacturing Company have paid me between four and five thousand dollars for the use of my patent; they have paid me from time to time, according to the prices which I have named above; the Delaware and Hudson Railroad Company have used some of my tires, and have paid me for them at the same prices which are named in my circular; they have
87 used and paid me for two tires, and have used two more, but I

do not know whether or not the bill for these tires has been sent to them as yet; that company buys a great many of their engines from the Dickson Manufacturing Company; those which they have used were used in repairing engines; these companies have paid me the prices named for the use of my invention on particular tires until they are worn out, and not upon a renewal of the tire.

Cross-examined:

The pecuniary advantage in the use of my invention consists in the fact that the tires can be attached cheaper when my invention is used than by any other plan of securing tires; the ordinary method of attaching them by bolts and nuts costs from eighteen to twenty-two dollars a tire for the attaching alone; it does not cost anything by the use of my invention, except that which is common to both modes of attaching, such as shrinkage; tires are sometimes shrunk on wheels, and are not secured either by my plan or by the use of bolts and nuts; such a mode of attaching the tires would be the same as in mine in point of expense; I think that in the mere economy of attachment my invention is worth from eighteen to twenty-two dollars per tire.

SEPTEMBER 21, 1875.

Present, Messrs. Fenton, Campbell and Mellon.

EDWARD MELLON recalled for further cross-examination:

To attach a tire by means of bolts and nuts costs from eighteen to twenty-two dollars, independent of the shrinkage; I do not know that frequently tires are shrunk on wheels without the use of bolts, nuts or other means of attachment, or without the use of my invention; I know that they are frequently so attached; they are not now almost universally so attached; I don't know how it is now on the Reading
88 Railroad; in 1868 they had all the tires secured by bolts, set screws or nuts; I don't know how they are secured on the Baltimore Railroad, nor how they are now secured on the Pennsylvania Railroad; I examined the latter road in 1868, or rather some of the shops in Lancaster and Harrisburg, and then those which I saw were secured by bolts, rivets or screws, in the usual way; the tires which I saw on the Reading Railroad in 1868 were steel, wrought iron and cast iron; on those roads which I am familiar with steel tires are more commonly used now than in 1868; steel tires are not generally attached now by shrinkage alone without the use of bolts, rivets or screws, or the use of my invention; they are so in exceptional cases.

I think the life of a tire would be one-fifth longer at least if my invention was used than without it; this estimate is based on a comparison of tires secured by my invention with tires secured by bolts; and the comparison would be still more favorable to my invention, if it were made with tires which were not secured at all; the life of a tire is a very indefinite thing; it depends upon the weight of the engine and upon the force which is applied to propel the wheel, as well as its own diameter; I could not tell what the average life of a tire on an engine is; it varies in different cases; one reason why my tire will last longer than others is that it is not perforated, and therefore is not so liable to break; then, in case of holes being all the way through the tire filled by a rivet, the rivet will drive down, in place of wearing, in many cases, and cause flat spots in the tread of the tire, which have to be turned down to make the tread true again. Those tires, with bolts inserted from the inside of the tire, are also weakened by the inequality of the rim, and when the tire

wears down near those bolts, then the steel tire is very brittle and dangerous at that point. Further, those bolts are not sufficiently solid to resist the jar or concussion against the rail, which vibrates against the face of the wheel, and wears the wheel down. When the tires are worn down to the bolt holes, the life of the tire is about reached,
89 whereas mine can be worn down to from seven-eighths to three-quarters of an inch in thickness at the centre of the tread of the tire; if they do break or become loose they can run their trip out in safety, without blocking the road or delaying other trains. Tires secured by bolts, rivets, or otherwise, would not be run after they had been worn down to be only an inch and a quarter thick, whereas mine would be used until it broke, or, rather, split. When a tire is put on by shrinkage only, there is nothing o resist the blow of the rail but the tightness of tire, and when that tire wears down to about an inch and a half and under in thickness, the band then becomes too thin to resist the blow of a heavy engine, and therefore the blow against the rail will move the tire upon the wheel and loosen it, and a tire of that thickness is not worth the trouble of being repaired, because it is not strong enough to bear the shock; in mine the flange bears the shock, and therefore it can be worn down thin. I think a tire would last longer when secured by bolts or rivets than when secured merely by shrinkage. I worked for the Delaware, Lackawanna and Western Railroad Co. in their locomotive shops as a workman, and continued there for about a year and a half in that capacity. In 1856 or 1857 I took a contract from them to do all their wheel and tire work; this contract ended in April, 1867, when I left their employment; since then I have not been engaged in manufacturing. I am familiar with the tires used in my vicinity on the Pennsylvania Central, the Reading, the New Jersey Central, the Delaware, Lackawanna and Western, the Delaware and Hudson, and the New York and Erie Railroads. With the exception of the Delaware, Lackawanna and Western Railroad, my knowledge is only to a limited extent, not having examined all the engines of the other roads. On the roads which I have mentioned steel tires are generally used, with the exception of the Reading Railroad, as to which I am not sure. With the exception of the Delaware, Lackawanna and Western Railroad, where they use
90 my invention principally, I think the roads use bolts and rivets to secure the tires principally. If the tire is made one-fifth more durable by my method, its value would be increased by one-fifth of its cost. A four-feet tire of two and a half inches thick steel would weigh about eight hundred pounds. I don't know what the cost of a tire would be; I never bought any; I don't think the element of safety is susceptible of measurement in dollars and cents. The Delaware, Lackawanna and Western Railroad Co., the Dickson Manufacturing Co., and the Delaware and Hudson Railroad Co. are the only parties who have paid me for the use of my invention. The Delaware, Lackawanna and Western Railroad Co. paid me two hundred and forty dollars for those which they used up to April, 1867, when they stopped paying; I have a suit against them now. The Dickson Manufacturing Co. paid me their last bill about six months ago; it amounted to about one thousand dollars, divided into two bills. There has been an understanding between me and the officers of that company that the money should be returned under certain contingencies. When I brought suit against the Lehigh Valley Railroad Co., George Dickson, the superintendent of that company, told me that it was not fair that they should pay me for the use of my invention if other manufacturers did not, and I proposed to give them a bond that the money which they should pay in the future would

be returned to them if I did not sustain the patent. This was agreed to by them; I gave the bond, and they paid me. I gave bonds from time to time as they paid me. After this action was decided in my favor by the court, they paid me without my giving any bond.

EDWARD MELLON.

H. STANLEY GOODWIN, being called on behalf of the complainant, and duly sworn, says:

I am the assistant general superintendent of the Lehigh Valley Railroad Co.; I prepared the two exhibits, Mellon A and B, which have already been produced before the master.

91 SEPTEMBER 24, 1875.

Present, Messrs. Fenton, Campbell, and Mellon.

H. STANLEY GOODWIN recalled for further examination:

Question. How many engines (give their numbers and names) have the Lehigh Valley Company which were built by contract (and not included in the lists Exhibits Mellon A and B?)

Answer. My answer is contained in a paper which I now produce (the master marks this paper Exhibit Mellon D). As to these engines in Exhibit Mellon D, I cannot say whether the tires have a square shoulder or not; I cannot say whether any of them are secured by bolts; all of these engines are in use now on the road; our engines run at times on all branches.

Question. Please state the thickness of the tires which were put upon the engines named in Exhibits Mellon A and B; and also, separately, the thickness of the tires put upon the engines named in Exhibit Mellon D.

Answer. I don't think it would be possible for me to answer the last part of the question, as those engines were built by contract; I have given you the names of the manufacturers. I will furnish an answer to the first part of the question in the form of an exhibit.

Cross-examination:

I don't think it would be possible to tell whether there was a shoulder on a tire, unless the shoulder was left a space away from the wheel. I have looked at several engines referred to in list D, but have not been able to discover whether or not there was a shoulder on their tires. Steel tires are in universal use with us, and have been for many years; I don't think we have purchased or applied any iron tires since the date of Mr. Mellon's patent. The method of applying a steel tire is by heating them and shrinking them upon the wheel; this is our only
92 method now, and has been for some years; we do not now use any bolts, rivets, or set screws to fasten the tires upon the wheels, and have not for some years.

Re-examined:

Iron tires were shrunk on by heating in former times, and I have known some of them to be secured by bolts; since November, 1874, the tires on our engines have been secured by shrinkage only, with no shoulder left on the tire.

OCTOBER 4, 1875.

Present:

WILLIAM MATTHEWS, being called for the plaintiff and sworn, says:

I accompanied Mr. Mellon on several days during the past week, from

Tuesday to Friday, to several different places on the line of the Lehigh Valley Railroad Co.; I know his patented improvement for wheels and tires; we examined a number of the engines named in Exhibit D, and out of that list we found twenty-six engines which had Mellon's patent improvement on their wheels and tires, similar to the upper part of figure 2 in the drawings annexed to the patent, that is, with a square shoulder or flange on the inner surface of the tire; we found none of the engines named in Exhibit D which had the improvement on them, except the Mason engines; the twenty-six that we found were all Mason engines; this list, marked Exhibit Mellon E, contains a statement of those twenty-six engines, the number of the engine, the name of the maker, and the time when they were built, taken by me from Exhibit D; Exhibit E also shows the number of Mellon tires on each of those engines, and also the thickness of each tire on the day when we examined it; these tires were all on driving wheels.

93 Cross examined by Mr. CAMPBELL:

I am president of a passenger railroad at Scranton, and am also engaged in the drug business in Scranton; I have had experience in locomotive wheels and tires for several years past, although I am not a mechanic; my attention was turned to the subject by my interest in Mr. Mellon's improvement.

Question. When did you acquire this interest in Mr. Mellon's improvement?

(Objected to by Mr. Fenton.)

Answer. About four or five years ago.

Question. What is the extent of your interest?

(Objected to by Mr. Fenton.)

Answer. I have a half interest, acquired by assignment from Mr. Mellon, the consideration for which was $10,000, paid partly in cash, half in cash at time, and half in deferred payments (witness says that he will send counsel a copy of the assignment); I bought my interest after this suit was begun, and the understanding was that I was to pay half the costs; I think this agreement was in writing; the second half of the consideration was to be paid either from the first of my receipts or after the first half had been repaid to me out of the profits, I forget which; I knew of Mr. Mellon's invention before this suit was brought, not before he got his patent, but soon after; "Mellon's Safety Tire Company" was not a corporation, but a mere business name, and was composed of Mellon and myself; I have contributed as my share of the expenses of this litigation $1,000, or $1,500, or perhaps more; this includes travelling expenses; the way in which we ascertained whether Mr. Mellon's improvement was on was by inserting a knife blade between the side and flange of the tire, and, also, by using the straight edge; in a few cases it was more difficult to determine whether the improvement was on than in others, but it did not take more than five minutes in any case; I believe all the engines built by Mason were heavy freight engines, heavier than ordinary passenger engines.

WILLIAM MATHEWS.

94 EXHIBIT E.

List of engines examined by Edward Mellon and William Matthews, in September and October, 1875.

No. of engine.	Maker.	When built.				
53	William Mason	Jan.,	'66	6 tire,	2½	inches.
125	"	June,	'69	6 "	2½	"
126	"	July,	"	6 "	1½	"
149	"	April,	'70	6 "	2½	"
150	"	May,	"	6 "	2½	"
151	"	"	"	6 "	2½	"
152	"	June,	"	6 "	2½	"
153	"	"	"	6 "	3	"
154	"	July,	"	6 "	2½	"
155	"	"	"	6 "	3	"
156	"	Aug.,	"	5 "	3	"
157	"	Sept.,	"	6 "	2½	"
158	"	"	"	6 "	2½	"
162	"	Nov.,	'74	6 "	3	"
163	"	Aug.,	"	6 "	3	"
177	"	Sept.,	"	6 "	3	"
178	"	"	"	6 "	3½	"
191	"	Aug.,	'73	6 "	3	"
192	"	"	"	6 "	3	"
193	"	"	"	6 "	3	"
194	"	Oct.,	'74	6 "	3	"
195	"	Sept.,	'73	6 "	3	"
196	"	"	"	6 "	3	"
197	"	Oct.,	'74	6 "	3	"
198	"	"	"	6 "	3	"
199	"	Nov.,	"	6 "	3	"

EDWARD MELLON, being recalled on his own behalf, says:

I examined several engines on the line of the Lehigh Valley Railroad in company with Mr. William Matthews; I heard the testimony in chief of Mr. Matthews before the master to day; it is true in every particular; I examined each of those engines with Mr. Matthews; all those engines named in Exhibit E had my patented improvement on them; Ex-
95 hibit E correctly sets forth the number of my tires on each engine, and the thickness of each tire at the time I examined them; they were all on driving wheels, and above forty inches in diameter; when I issued my circulars in 1867, I sent them to the principal railroads throughout the United States, and to the different officers—presidents, superintendents and master mechanics; I brought them personally to officers of the Lehigh Valley Company, in April, 1867; I must have given these circulars to Mr. Blakesly, who said he was authorized by Mr. Packer to negotiate with me for the use of my improvement on their road; I know positively that the calculations we made during that interview were figured on the schedule prices of royalty named in my circular; Mr. Blakesly said he would report to Mr. Packer, and lay the matter before the board, and that probably the money would be paid in ten days; after the ten days was up I called on Mr. Packer, and he referred me to Robert H. Sayre; Mr. Sayre told me that if I thought I had any claim on that invention I knew how to collect it; Mr. Packer talked to me about it on several occasions.

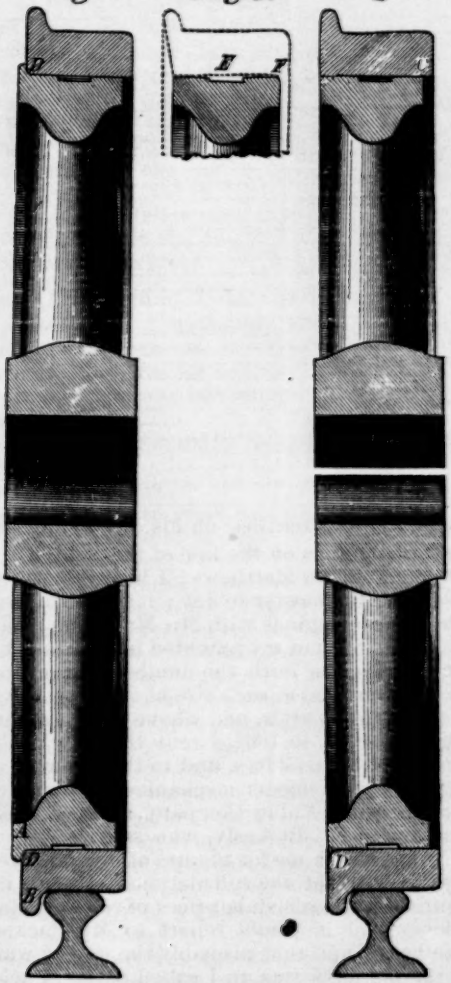
Cross-examined—Mr. CAMPBELL:

When I refer to Mr. Packer, I refer to Mr. Asa Packer, president of the company; Mr. Blakesly was superintendent of Beaver Meadow division in April, 1867; at least he had some position of that kind; I also saw Mr. Goodwin, Mr. Brodhead and Mr. Robert H. Sayre; my first communication with the company was through Mr. Packer, at Mauch Chunk.

EDWARD MELLON.

96 *Mellon's improved locomotive tire.*

Fig 1. *Fig 3.* *Fig 2.*



Locomotives are retained on railroads by means of flanges projecting inside of the rail, but the parts exposed to the track will soon wear out, and the driving-wheels, with their attachments, are too expensive to be replaced so often; therefore, tires with flanges are made separately and fitted and shrunk upon the plain surface of the wheel, and when worn out replaced by others.

It is conceeded by all railroad companies that the unavoidable working loose of the tires on locomotive driving-wheels is a large bill of expense annually. A great number of devices have been resorted to to obviate the difficulty, but with slight success.

The tire will eventually become loose by stretching; then, when curving, the plain surface of the wheel will pass through the plain surface

of the tire, allowing the wheel on the opposite side of the engine to drop inside of the track, and by this impulse, the wheel with loose tire would go through and drop outside of the rail, leaving the loose tire upon the rail with the flange inside of the rail, which must of necessity drop over and become entangled with the machinery, thus frequently destroying the machinery and endangering the lives of all upon the train.

One method of security from such danger is by a number of conical head bolts through the tire and riveted on the inside of the wheel rim. It is plain that both the wheel and tire, by this process, are materially weakened, the tensil strength of the tire, to the extent of over forty tons, and as the tire becomes concave by stretching in the center of the outer surface, it must bear on the outer edges of the wheel and raise in the centre. It will then break the bolts or draw their heads below the surface of the tire, causing low spots (or flats as they are called), which flats will increase rapidly in depth, and require the whole set of tire to be turned down to the thickness of the thinnest part of any one of them, causing a lavish waste of expensive material, and the tire, which should present a solid substance to the track, is reduced to a perforated ring; hence, while the chances of breaking are increased their durability must be greatly impaired. To repair tire thus secured, it is necessary to disconnect the rods on both sides of the engine, and cut and punch out rivets, to unbolt and take out balance weights to get at some of them. When the tire is closed in by the smiths, the holes in the wheel and tire will not coincide, and when an old tire is replaced by another old one, as is frequently done, all the holes must be drilled by hand at a great expense of labor as well as loss of the service of the engine.

All master machinists know that the wheel-rim thus secured, is shattered at the bolt holes by the shrinkink force of the tire (which is over three hundred tons). When the tire stretches, the wheel reacts and the points crushed by compression are separated by reaction, and rendered entirely unsafe and unfit for use. And with all its defects, this method may be regarded as the safest, best, and cheapest of all the old devices. Hence I mention its general features in order to compare it with my improvement, the advantages of which, the following statement of facts will show:

1st. My improvement secures the tire upon the wheel without the aid of bolts, keys, screws, or any other attachment.

2nd. The balance weights can be cast in the wheel-rim, thereby saving all that tedious and expensive of operation of casting, fitting, and bolting the weights in the wheel, and also the danger of their coming loose while in motion, thus preventing accident from them.

3rd. The wheel can be made stronger by the incorporation of the weights in the wheel-rim, and as the additional mass on the rim will cause it to press upon the arms instead of drawing on them as heretofore, and lighter because the balance weight will be farther from the centre.

4th. By this method the tire can be put on by the commonest man, as there is no gnaging, or dividing of distances (as that is done while in the lathe) but simply to clamp the tire forwvrd and cool it off.

5th. In repairing or resetting, these tire possess a wonderful advantage for dispatch and economy. They can be transported from the back to the forward wheels without drilling or plugging up a hole, or using or cutting out a bolt. They an be tightened by liners, and remain as true latterly as before.

6th. These tire will wear 20 per cent. longer thsn tire secured by bolts or rivets, for the time of service of a set of tire is the durability of the worst part of the worst one of them.

97 7th. The tire will remain tight much longer than by the old method. The obtuse angle at C, Fig. 2, shows how the outer edge of the wheel is supported from crushing when the tire curves down on the edges by the action of the rail upon the center of the outer surface, as seen in Fig. 3, at E and F, and the inner edges of all the tires are curved at the inner surface to prevent indenting, cutting into, or crushing the inner edge of the wheel rim at D.

8th. When new wheels are to be made with the view of applying tires as per Fig. 1 and lower section of Fig. 2, the wheel rim should come flush with the tire on the outer side, and the outer edge of the tire on the inner surface should be slightly curved so as to bear on the wheel ⅜ of an inch from the edge and be open 1-10th of an inch at the edge; this will give base, substance, and surface to use that turning down force of the edges which are not stretched by rolling upon the rails, but are forced downward and inward by the action of the rail upon the centre of the tire.

I hope the utility of this part of the improvement is apparent. The principle by which the tire is secured upon the wheel in case it should become loose or break in one place, will be readily perceived by reference to the engravings. Figs. 1 and 2 represent the improved method of forming and attaching the tire. Fig. 3 is a section of an ordinary tire, worn and stretched by use. Fig. 1 shows a wheel and improved section, the wheel having on its inner edge a rim against which the edge of the tire sets firmly. It will be seen that the flange A, upon the periphery of the wheel, prevents the tire, should it become loose, from slipping off at the inner side of the wheel, and the flange B, of the tire, prevents it from slipping off at the outer side thereof.

The same result will be attained by having the inner surface of the tire at its outer edge provided with a flange or rib, as at C, Fig. 2, which rib answers the double purpose of supporting the corner of the wheel rim and also of retaining the tire upon the wheel, for it is plain that the tire cannot leave the wheel either at the right or left side thereof.

It is of the highest importance to new roads, or companies having new engines built, to order their wheels made and tires secured in this way, as the builders will save over $100 on each engine, and the R. R. Co.'s will save thousands of dollars in repairs, as well as by the constant use of their engines, for if this tire does become loose the engine can run safely for days or till it is convenient to repair it. This fact will be vouched for by Watts Cooke, esq., of Scranton, Pa., sup't of rolling stock on the D., L. & W. R. R., who has thoroughly tested their superiority on this road. He used an old set for nine months on a 33-ton engine. The latter part of this time the engine ran several hundred miles with loose tire, and finally wore three of them through in parts.

This improvement in securing tire has received the highest encomiums from all the roads upon which it has received a trial, and the inventor is assured that the day is not far distant when, by its own superiority, it will supercede all other tires now in use.

LIST OF PRICES.

For 2½ tire and over 40 inches in diameter	$10 00	per wheel.
" " 40 inches or under	5 00	" "
" tire 2¾ inches and upwards	12 00	" "

For further information, address the patentee,

E. MELLON,
Scranton, Pa.

98 *Master's report and exceptions.*

In the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit. In equity. April sessions, 1868. No. 2.

EDWARD MELLON
vs.
THE LEHIGH VALLEY RAILROAD COMPANY, and Asa Packer, president of said company.

To the honorable the judges of the said court:

The undersigned was appointed master by the decree of your honorable court, made on the 7th day of October, A. D. 1874, in which it was, inter alia, ordered and decreed as follows, to wit: "That the letters patent of the United States for improvement in locomotive wheel tires, granted to Edward Mellon, October 2, 1866, are valid, and that the title thereto is duly vested in the complainant. And it is further ordered, adjudged, and decreed that the said defendants have violated and infringed upon the exclusive rights of the complainant, as vested in him under and by virtue of said letters patent, as in said bill of complaint alleged and set forth, by making and using tires and wheels for locomotive engines made and applied in imitation of the improvements
99 set forth in said letters patent, without any right or license so to do. And it is further ordered, adjudged, and decreed that the complainant do recover of the defendants the profits and gains made and received by them, the said defendants, in consequence of the infringements and violations of the exclusive rights of the complainant, together with the costs of the prosecution in this cause expended by said complainant; and further, that it be, and is hereby, referred to Robert N. Willson, esq., as master, to compute, ascertain, and assess said profits and gains, and to take the proofs, and report the same to the court, with leave to either party to move the court, upon notice, for special instructions to said master in reference thereto."

The master has been attended at the meetings, which he has held in the performance of his duties, by Hector T. Fenton and Furman Sheppard, esqs., for the complainant, and by Alexander D. Campbell, esq., for the defendants.

The proofs which have been submitted to him he returns to the court at the same time with this report.

The decree of the court, under which the master is acting, determines, for the purposes of his functions, that the defendants have infringed the plaintiff's patent, referred to in the said decree, "by making and using tires and wheels for locomotive engines, made and applied in imitation of the improvements set forth in said letters patent, without any right or license so to do."

The duty of the master, under this decree, is to compute, ascertain, and assess the profits and gains which the defendants have made and received by reason of such infringement of the plaintiff's patented rights.

The counsel for the plaintiff have requested the master to arrive at these profits upon the basis of the license fee or royalty, which they claim has been established for the right to use his improvements in tires and wheels for locomotive engines. Proofs have been offered in support of this request and claim, and the master is now asked to
100 make report to the court of the profits or gains which the defendants have realized by their infringements upon this view of the measure of their responsibility.

It is claimed, on behalf of the plaintiff, that there has been established, for the right to use the improvements which are protected by his letters patent, a license fee of ten dollars each for tires less than two and three-quarter inches in thickness, and of twelve dollars each for tires of greater thickness; the tires in both cases being over forty inches in diameter. The proofs—Exhibits A and E—show that the defendants have imitated the plaintiff's invention in two hundred and sixty tires of the smaller, and in two hundred and forty-nine tires of the larger dimensions just stated. Upon this point the master does not understand that there is any dispute between the parties, so far as the question before him is concerned. The royalties claimed would, therefore, aggregate $5,588.00; the plaintiff also claimed the sum of $1,240.32, interest upon the former sum to date, making the total claim $6,828.32.

To demonstrate the establishment of the alleged license fee, the plaintiff relies solely upon his own testimony.

Without quoting his statements upon this point in full, their substance may be condensed into these four elements, viz:

First. That the plaintiff issued and widely circulated, about the year 1867, a circular describing his invention, and naming the prices before stated as his rates of licensing its use.

Second. That the Dickson Manufacturing Company, who are locomotive builders at Scranton, Pennsylvania, have used his invention from about the time last stated—1867—to the present time, at the rates mentioned in his circular, and by his permission or license, and have thus paid to the plaintiff for such use four or five thousand dollars.

Third. That the Delaware and Hudson Railroad Company have
101 used two of his tries, and paid for them at the said rates, though not, as the master understands, by his antecedent permission; and

Fourth. That the Delaware, Lackawanna and Western Railroad Company paid him for the use of his invention two hundred and forty dollars, prior to April, 1867, when they stopped paying for its use; the plaintiff subsequently bringing suit against them for an alleged infringement of his rights.

The cross-examination of the plaintiff developed the fact that he has had an understanding with the officers of the Dickson Manufacturing Company, that he should return to that company the money which was paid by them for the use of his invention, if his rights, as claimed under his letters patent, should not be sustained. He gave bonds to the said company to secure such repayment until the decree of the court in this case was made, since which time they have paid without requiring any bond from him.

It is upon the basis of this testimony that the counsel for the plaintiff claim that a license fee for the right to use his invention has been so established that the master can properly take it as the standard for estimating the profits, or gains, which the defendants have made in consequence of their infringements of the plaintiff's rights.

The master is, however, unable to adopt this view. It has been urged upon him, apparently with much confidence, that the fixing by a patentee of the price for which he will dispose of the right to use his improvement, whatever it may be, of itself establishes the rate or license fee, which he is entitled to apply to infringers.

Aside from the fact that this principle, if well founded, would put a very dangerous and destructive power in the hands of inventors, the proposition is not regarded by the master as sustained by authority. (See Packet Company vs. Sickles, 19 Wall., 611.)

As he understands the cases on the subject, even where the rule
102 for determining the amount to be paid by an infringer to a patentee would properly be held to be an established license rate, the proof of the existence of such a rate involves two constituents at least, viz, the fixing by the patentee of a price for the use of his improvement, and the recognition of the propriety of that price by a reasonable number of persons who have been willing to pay it, and by payment thereof have actually recognized its propriety and thus established a market rate or license fee. The precise number of persons paying who are required to make out such a condition of things, cannot be stated; the sufficiency of any number that is shown in any particular case must be left to the fair judgment of the court or jury.

Under this view of the law, and endeavoring to apply a fair judgment to the facts of this case, the master cannot report that the plaintiff has shown that there is any established recognized license rate for the use of his improvement in tires and wheels for locomotives. The amounts paid by the Delaware and Hudson Railroad Company and the Delaware, Lackawanna and Western Railroad Company are, under any circumstances, too insignificant to be of much weight on the point, particularly in view of the fact that the latter company, very soon after the introduction of the patent, refused to pay the license fee which the plaintiff demanded. The master is of the opinion that the payments which have been made by the Dickson Manufacturing Company for the right to use the plaintiff's invention, are the only acts which could properly be regarded, even if they be considered as not affected by the conditional character which appertained to most of them, as a substantial acknowledgment, or adoption, by any party other than the patentees of alleged license rate; but he does not regard such payments made by that company, though supported by the other instances referred to, as sufficient to make out an established rate of license, in the sense which he understands the law to give to such a standard. In his opinion, a more general recognition of the propriety of the price fixed by the
103 patentee would be requisite to give to it the character which he claims for it.

Aside from these considerations, moreover, the master is of the opinion that, even if the plaintiff had clearly shown an established license rate for the use of his inventon, he would not be entitled to have the profits or gains realized by the defendants estimated on that basis in this proceeding. Such a standard is, doubtless, in many cases proper for arriving at the damages suffered by a patentee from an infringement of his rights; but the plaintiff has no decree under which he has the right to ask for such damages. Previous to the act of Congress of July 8, 1870, a plaintiff was not entitled to recover his damages, as such, in a proceeding in equity, as the master understands the law. This case, having been instituted before the passage of that act, by virtue of its provisions came under the operation of the law upon this subject as it existed when the suit was brought; and, accordingly, it will be observed that the decree is framed to cover profits, or gains only, and not damages. This distinction seems to be recognized in the case of Emerson vs. Simm, (6 Fisher, 281,) and, instead of that case being an authority for the plaintiff's position before the master (for which purpose it was cited), it appears to be directly the reverse, for the court only permitted the royalties to be made the standard for measuring the defendants' liability, in consequence of the fact that the decree was framed under the said act of July 8, 1870, and directed the master to estimate the damages

which the plaintiff had suffered, as well as the profits which the defendants had made.

In this case, the master has no such direction nor, in his opinion, has he such power.

As has already been substantially stated, the act of Congress just referred to appears to make the same distinction between damages and profits.

104 It is true, as has been urged upon the consideration of the master, that the defendants' profits or gains may be regarded, in a sense, as unliquidated damages due to the plaintiff, but not in the technical or restricted sense of being what the plaintiff has lost or suffered by reason of an infringement; to determine which, an established license fee might be a very suitable guide.

The theory of a proceeding in equity for the recovery of such profits is that an infringing defendant is a sort of trustee of the plaintiff to the extent of whatever he has gained by the unlawful use of the latter's patented improvement. These might, possibly, be the same as the actual damages or loss of a patentee in a case where he monopolized the use of his patent and himself endeavored to derive all the benefit of its employment; but this would not seem to be true where the patentee, as in this case, was willing that the public should use his improvement and derive a large profit from it, as he claims, by obtaining his license. In such a case as the latter, it might well be said that the inventor suffered a damage to the extent of an established license fee in each instance of an infringement; but there would seem to be nothing in the nature of such a fee to make it an appropriate standard to determine what the infringer has realized in the way of profits or gains from his unlawful use of the invention.

Treating, therefore, the matter before him on the basis of the plaintiff's claim as it has been presented to him, the master reports that the plaintiff has not shown that the defendants have made or received any profits or gains "by making and using tires and wheels for locomotive engines made and applied in imitation of the improvements set forth in the said letters patent."

All of which is respectfully submitted.

ROBERT N. WILLSON,
Master.

OCTOBER 6, 1875.

105 *Exceptions on behalf of complainant to the report of Robert N. Willson, esq., master.*

MELLON
vs.
L. V. R. R.

The master erred—

I. In not finding and reporting that the proofs submitted by the complainant were sufficient to establish a license rate.

II. In not finding and reporting under the evidence (from the nature of the invention and mode of remuneration adopted by the patentee,) that the royalty or license price fixed by him, and acquiesced in by others, was the true measure of gains, profits, or damages to be applied in this case, as requested by the complainant.

III. In refusing to adopt the license price as the measure of the amount which the complainant in this case under the decree was entitled to recover.

IV. In refusing to report that the complainant, under the decree, was entitled to the sum of $5,588.00, as claimed by him, being the aggregate amount of royalties on the infringing wheels and tires used by defendant, as set forth in accounts Exhibits A and E.

V. In refusing to report that the complainant, under the decree, was entitled to the sum of $6,828.32, as claimed by him, being the aggregate amount of royalties mentioned in the 4th exception, together with $1,240.32 interest thereon.

F. SHEPPARD,
H. T. FENTON,
For Complainant.

OCTOBER 16, 1875.

The foregoing exceptions on the part of the plaintiff to the above report were filed with the master on October 16, 1875. Having considered the same, he finds in them no reason why he should alter the conclusions already expressed by him in his report.

ROBERT N. WILLSON,
Master.

OCTOBER 18, 1875.

106 *Exceptions on behalf of defendants to master's report.*

The defendants except because the master reported as follows:

"It is claimed on behalf of the plaintiff that there has been established for the right to use the improvements, which are protected by his letters patent, a license fee of ten dollars each, for tires less than two and three-quarter inches in thickness, and of twelve dollars each for tires of greater thickness; the tires in both cases being over forty inches in diameter. The proofs, Exhibits A and E, show that the defendants have imitated the plaintiff's invention in two hundred and sixty tires of the smaller, and in two hundred and forty-nine tires of the larger dimensions just stated. Upon this point the master does not understand that there is any dispute between the parties, so far as the question before him is concerned, so that the royalties claimed would aggregate $5,588. The plaintiff also claimed the sum of $1,240.32 interest upon the sum to date, making the total claim $6,828.32."

ALEX. D. CAMPBELL,
Attorney for Defendants.

OCTOBER 20TH, 1875.

Master's reply to foregoing exceptions.

The foregoing exception was filed on behalf of the defendants after the master's report was put in print. Taking into consideration the order which was made by the master on January 21st, 1875; the Exhibit A
107 which was produced by the defendants in pursuance of the said order, and the testimony of Messrs. Matthews and Mellon (pp. 13-16), he thinks the statement excepted to is fully supported. The master also correctly stated his understanding of the views of the parties before him with reference to the matter upon which he reported. He may, however, have been mistaken about this, and it is but fair to the defendants that he should say that he made his report upon the questions referred to in it at the request of counsel of both parties, for the purpose of having the true measure of profits in the case determined by the court, with the expectation that the matter would be referred

back to him, or some other person as master, to make such further examination as should be material to do justice to all parties.

ROBERT N. WILLSON,
Master.

OCTOBER 21ST, 1875.

And afterwards, to wit, on the 22d day of October, A. D. 1875, the cause having been argued by the respective solicitors for complainant and respondent, upon the master's report and exceptions thereto, the same is referred back to the master with verbal directions from the court (the master being present in court).

And afterwards, to wit, on the 20th day of November, A. D. 1876, the master files his second report, with exceptions thereto, as follows:

108 *Complainant's proofs.*

DECEMBER 1, 1875.

Present, Messrs. Fenton, Campbell, and the plaintiff.

WALTER DAWSON, a witness called on behalf of the plaintiff, is sworn, examined, and says:

My name is Walter Dawson; I reside at Scranton, Pennsylvania; my occupation is that of master machinist of the Delaware, Lackawanna, and Western R. R. Co.; I have been master machinist between thirteen and fourteen years.

Question. What experience, if any, have you had in the manufacture and application of tires to the driving wheels of locomotives?

Answer. I have had no experience in the manufacture of tires, but, having the whole charge of the locomotive machine-shops, I know that we take off old tires when they are worn out and put on new ones; that is my department.

Question. Please explain the method and cost of attaching or securing tires to driving wheels of locomotives when they are attached by means of bolts, rivets, or screws.

Answer. That is a question which I can't answer, because we have used steel tires so long fastened by Mellon's patent arrangement, and some with no fastenings at all, that I could not tell what it would cost to fasten the tires, by bolts, rivets, or screws; I could estimate it; I have thought the matter over and made up my mind what I think it would cost, but I don't know that I am right; my estimate is that it would cost about thirteen dollars for each wheel to fasten the tire by either bolts, rivets, or screws; that estimate includes both labor and material; I would qualify my answer, and say that my estimate relates to the use of screws; rivets are not used with steel tires,
109 so far as I know; the items of my estimate are six steel screws, and six nuts for the same, and the labor of making the screws, drilling the holes, and fitting the screws into the wheel; my estimate is not a high one, it is rather low; in builders' shops it would cost more for profit; I have simply added to what it would cost in our shops a little for the wear and tear of tools; at the present rate of wages the cost would be a little less than what I have stated; wages are low; my estimate would be a fair one for the two past years; prior to the panic of 1873 wages were higher, and the cost would be a little higher; I have estimated for a wheel of the diameter of five feet or five feet and a half; I would use the same number of screws for a wheel of either four feet and

a half, five feet, or five and a half; I have had no experience in the use of steel tires attached by screws; in steel tires, if we were fastening them by screws, we would not bore them all the way through the tire, because in steel it would make the tire weak and liable to break at that point.

Cross-examined:

Steel tires are now in almost universal use; I know of no iron tires in use at the present time; steel tires are usually attached, so far as my knowledge goes, by shrinkage only; we are using Mellon's improvement now at all the shops on our road; there is a little difference in the cost of attachment of the tire by shrinkage alone, and shrinkage with Mr. Mellon's improvement; without his improvement it would cost a little more; I should think a dollar would cover it easily; the only saving in the cost of attaching the tire by the use of Mellon's improvement consists in dispensing with the use of clamps when setting the tire in its true position; there would be some additional labor in the lathe in order to prepare Mr. Mellon's tires to be put in position on the wheel; I should
110 think the difference in time would be about an hour or an hour and a half; it is customary to charge for the use of the lathe about ten dollars per day, or a dollar an hour; we have a number of our engines where the tires are attached by shrinkage only, without the use of Mellon's improvement; steel tires have been in general use, I should think, for ten or twelve years; we have one engine with the shoulder on the inner surface of the tires; all the others have the shoulder on the wheel corresponding with a recess on the tire; I now refer to the engines having Mellon's improvement; the shoulder is rounded in all cases.

Re-examined:

I cannot think of any saving in the use of Mellon's improvement in the turning down of the face of the wheel after the tire has been attached to it; the weight of a steel tire, fifty-six inches and a quarter inside diameter, five and three-quarter inches wide, and two and a half inches thick, is eight hundred and forty-seven and a half pounds; they are worth now from nine to ten cents per pound; the price has varied very much in the past seven years—from twenty cents down to the present price; I never knew them so low as now.

WALTER DAWSON.

WILLIAM C. CONWELL, a witness called for the plaintiff, is sworn, examined, and says:

I reside at Scranton, Pennsylvania; I am past forty two years of age, I think; I am a machinist by occupation; I am at present the foreman of the Delaware, Lackawanna & Western R. R. Co.'s machine-shop at Scranton; my department might be termed the power department, where the tires and wheels of locomotive engines are made and put together; I have had charge of that department for about fifteen years or so; it is so long since I have known of any tire being fastened by
111 bolts or rivets, that I don't think I could come anywhere near the cost of fastening tires in that way; it would be less, I think, than by fastening with screws; we have had, and I think still have some engines on our road in which the tires were fastened to the wheel-centres by screws; we don't attach any now by screws; we use Mellon's improvement, and also do it by simple shrinkage; I can't give the exact cost of attaching the tires by screws—can't tell whether my estimate is correct; I have my opinion about it, which is founded on an estimate I

have made; I think we could do it in our shops, using six screws to a wheel, for about fourteen dollars and forty-six cents, including everything—labor and materials; that is the cost price at the present time; I put steel at sixteen cents per pound; I think the cost would have been more if the work was done six years ago; labor and materials were higher then than now, and they have been decreasing ever since.

Question. What method, in your opinion, would be the safest and most economical, both in first cost and in use, of attaching a steel tire to locomotive driving-wheels?

Answer. I think the method known as the Mellon fastening would be the safest and most economical, if it did not cost too much for the right to use it; I suppose that they look upon set screws as the next best method of attaching the tires; I should judge that that is the judgment of mechanics generally, because the screws are generally used; I suppose it all comes down to this, that for steel tires we must use either the Mellon improvement, or set screws, or shrinkage alone; the usual thickness of a steel tire for passenger engines is from two and a quarter to two and a half inches; for heavy freight engines they are made as thick as three inches; when a steel tire is fastened by set screws, I consider it unsafe to use when it is reduced to about an inch and a quarter in thickness; I think we can use a tire fastened with
112 Mellon's improvement when it is worn a little thinner than when fastened by shrinkage alone; in the use of Mellon's improvement the shoulder assists materially in bearing the shock of the rail; we run tires fastened by Mellon's improvement an inch in thickness. I don't remember any thinner than that. I can't tell how thin the tire can be run when it is fastened by shrinkage alone; they come off of different degrees of thickness; this would happen to a tire secured in any manner whatever; this would occur oftenest in tires secured by shrinkage alone, as compared with the use of Mellon's improvement, for the reason that the shoulder assists in holding the tire in place. If the tire should come loose while the train was on the road, it might or might not make it necessary to take the engine off the track. I have known it to happen without doing any harm; if the tire attached to the guiding wheel should come loose, it would not be safe to go on with the train—that is, if there was no fastening on the tire; in the case of a tire provided with Mellon's improvement, even if it should become loose from the wheel, it could not come off unless it was broken up or the shoulder was broken from the wheel and the engine could be run with safety. I have known trains to be held behind their time by tires coming off the wheel. I think the tire could be run thinner if fastened by Mellon's improvement than if fastened by shrinkage alone. I do not think that it would be safe to run a tire fastened by shrinkage alone thinner than an inch and an eighth; the risk of breaking would be as great in one case as in the other; we have taken off tires an inch and three-eighths thick; the average thickness at which we take them off is about an inch and a quarter; this applies to all kinds of tires. I don't know that on our road we ever tried to run the Mellon tires thinner than the others; Mr.
Dawson and I have looked at engines when the tires showed that
113 they had moved and allowed them to be used on the road, because we thought they would give us no trouble in consequence of their having the shoulder on the wheel; it was cold weather, and we thought it was better to use the tires in such condition than to line them and run the risk of breaking them. I cannot tell what we would have done in those cases if the tires had been attached by shrinkage only. I remember that we looked at the engine "General Kearney," when the

tire had been disturbed or moved on the wheel—it had Mellon's improvement—and we allowed it to run, and I think it must have run in that way for a month. I could not tell whether or not we would have permitted that engine to run in that way if the tire had not been fastened by Mellon's improvement.

Cross-examined:

We use in our shops both shrinkage alone and Mellon's improvement in fastening tires; we use Mellon's improvement with the new wheels; we have only two engines with the shoulder upon the inner surface of the tires; all the rest having Mellon's improvement have the shoulder on the wheel and a recess in the tire; we have altogether abandoned the use of set-screws and other methods of fastening, than the two which I have named; the shoulder assists in bearing the shock of the rail when the tire is loose or approaching that condition. I see no difference in the practical results of the two models of Mellon's improvement; all the shoulders on our wheels and tires are rounded. I think there would be a difference of about half an hour in favor of Mellon's improvement, as compared with shrinkage alone, in the cost of putting the tire into position, because it dispenses with the time of a man who would otherwise set the clamps to get the tire into true position; the total difference in getting the tire ready for going under the engine would be about an hour and a half of lathe work, in favor of
114 Mellon's improvement; my opinion in this matter is founded not on theory, but on my personal observation; I do not think that a tire fastened by Mellon's improvement would last any longer than if fastened by shrinkage alone, but you could use it longer and wear it thinner.

I have never made any actual test of the two modes of fastening, so far as the wear of the tire; my views are not the result of theory, but of experience; we have run a tire on the engine "Fairfield," lately put in the shop, longer than we would have done if it had not been fastened by Mellon's improvement; I don't remember how thin the tire was; the engine had four of Mellon's tires on—on the drivers; I do not remember that they were all loose; there were at least two of them loose; these were the forward or main wheels; we run the "Fairfield" about a couple of months after the tires became loose—during the summer, when we were hard up for engines; she was a passenger engine; I don't think that we would have used her in that condition if we had not been hard up for engines; we never run loose tires not fastened by Mellon's improvement, except to come home; we do not make any exception on our road in favor of Mellon's improvement so far as the running of the tires is concerned, as a rule—in exceptional cases for a single or several trips, we do make a difference. I do not remember any particular instance in which Mr. Dawson and I looked at an engine and he decided to let her go because she had Mellon's improvement, except the "General Kearney;" we have records in our shops of the miles run by different tires, but not as to the kind of fastenings; we keep the records by the name of the engine; by reference to the records I think the lives of the different tires could be ascertained; the records as at present made, do not expressly show the lives of the Mellon tires.

115 Re-examined:

The life of a tire is affected materially by the weight of an engine and by the size of the wheel; if we had the records we could not

compare the lives of the tires, without taking such matters into consideration.

W. C. CONWELL.

JOHN SWIFT sworn:

I reside in Scranton, Pennsylvania; I am connected with the Dickson Manufacturing Company as master machinist; I have charge of the locomotive shops of that company; they are builders of engines, and have built them for about fifteen years; I have been superintendent there about seven years. Steel tires are now applied by our company to locomotive engines by shrinkage; we use Mellon's improvement, and we also put the tires in by shrinkage alone, without Mellon's improvement; some builders still use screws with the steel tire; I presume that most of them do; I observed on one engine to day—a new engine—that the tires were fastened by set screws; it was marked as if made by the Rogers works; I consider a tire shrunk on a wheel and not broken perfectly secure without any screws or Mellon's arrangement, but in case of a fracture I think Mellon's improvement is the safest that I have knowledge of; the cost of applying a tire plain would not be anything except the cost of boring the tire and turning the wheel, which would have to be done in the use of any kind of tire; the turning on the plain tire would probably be a little less expensive than on the Mellon tire—probably an hour's difference; we never experienced any difference in the cost of setting the tires so that they would fit the wheels; I presume it would take a little more time to set the plain tire than the Mellon tire, because we would have to use gauges; I think the Mellon tire is generally worn thinner than the plain; I cannot state how
116 much thinner; I have made an estimate of what we would be willing to attach a steel tire by six screws to a locomotive engine wheel for; I estimate that we would be willing to take a contract to do that work, using nuts, at thirteen dollars and thirty cents, and not using nuts, at twelve dollars and forty cents, at present prices; seven years ago I think the cost would have been more; labor and material were higher then than now; our company uses the Mellon improvement on passenger engines almost exclusively, and for freight engines to order; our capacity for building engines is four a month; I have received Mr. Mellon's bills for his royalties at ten dollars per tire—not over that; we make our tires from two and a half to three inches in thickness; we never repair tires; we re-turn them for parties when they are worn by the tread of the rail.

Question. Taking into consideration the elements of the safety and economy in use of Mellon's improvement, state whether or not, in your opinion, there is a saving to the party using that improvement of an amount equal to or greater than the royalty price charged?

(The question is withdrawn for the present.)

A tire fastened to the wheel by shrinkage alone, if it became loose, might shift from its place; if fastened by screws, and it became loose, the tire would probably keep in its place, if they did not break; I could not say of my own personal knowledge, not using them, whether or not the Mellon tires are as likely to get loose as those fastened by shrinkage alone; if the Mellon tire was properly applied it would not be possible for it to pass through the wheel, even if it should become loose, the engine being in motion; if the tire were fastened by shrinkage alone, and it became loose, it would be very likely to pass through the wheel in turning a curve; the average weight of a tire four feet and eight inches inside diameter, five and a half inches wide, and two and a half inches thick, would be seven hundred and ninety-two pounds; the

117 average weight of a tire, fifty and three-quarter inches inside diameter, five and a half inches wide, and three inches thick, would be eight hundred and forty pounds; we paid, I think, ten cents, gold, for the last tires we bought per pound; I think the price was different eight years ago; I have no personal knowledge of the length of time tires will run.

Cross-examined:

Our practice is to turn a recess on the inner edge of the tire, leaving a projection on the inner edge of the wheel to correspond to the recess; we always round the shoulder, leaving a little clearance on the top; we have never, so far as I know, made any with a projecting shoulder on the tire, and a plain wheel centre; I think it would not take more than an hour's turn, on the average, to turn out the recess and leave the shoulder; it would take about twenty minutes or a half an hour to apply and remove the gauges which I have spoken of; if the gauges or clamps were properly applied, I think the tire would require no more work afterwards than if Mr. Mellon's invention were used; we use clamps or gauges in our shops, usually, except when we use Mellon's improvement; I consider it an effective plan to use the clamps; my opinion as to tires fastened only by shrinkage coming out of the wheels, is a matter of theory, and not of experience; I do not know of my own knowledge, an instance where a tire so attached came out of a wheel; we have not turned out four engines per month for the past two or three years; during the year ending June last we made only three, I think, and in the year before that, about twenty; our shops were burnt down last February; I have no means of making any comparison between the life of a tire fastened by Mellon's improvement and of one fastened by shrinkage only; I have observed tires which I knew were fastened by

118 Mellon's improvement running on the road thinner than I would have used them if they had been fastened plain—that is, by shrinkage alone; I could not say whether those tires were loose or not; I have observed a great many instances of that description; I would not have run them so thin if they had been fastened plain; so long as they were not broken and tight, they would be as safe one way as the other; for freight service, I think it safe to run a tire, applied by shrinkage only, until it is reduced to an inch and five-eighths in thickness; for passenger service—that is a hard question for me to answer; I do not use tires at all; I know about the freight tires, by considering the danger to life; I do not think it would be advisable to run a train, when a tire fastened by Mellon's improvement had broken, farther than to a switch, or place where the engine could be changed; if such a tire were loose, I think it would be only advisable to run the train slowly to a place where the engine could be changed; I have known tires on freight engines, fastened by Mellon's improvement, to run when they were an inch and a quarter in thickness, more or less; I do not know of any tires, secured by shrinkage only, in freight engines, running so thin as that; they may have done so; my title in the Dickson Manufacturing Company is superintendent of the locomotive and car shops; I approved the bills for Mr. Mellon's royalty; I know that our company took a bond from Mr. Mellon; I have seen the bond.

JOHN SWIFT.

SAMUEL DOTTERER sworn:

I reside at Carbondale; I am a master mechanic in the Delaware and Hudson Canal Co.; I have charge of their engines at this end of the road; I had very little experience in the manufacturing of tires, but

have had considerable in the use of them; we have only had one engine on the road that had a tire fastened by screws; it was a wrought
119 iron tire; she was destroyed about two years ago by collision; the usual method of fastening a steel tire is by set screws; I have used some eight or ten engines which have Mr. Mellon's improvement on them; our company has more of such engines at the Albany end of the road.

Question. How does the tire, secured by the Mellon improvement, compare with the tire secured by screws, in point of safety and economy in use and repair?

Answer. I think it is far preferable to any other mode of fastening the tires, in safety and economy; we have a Mellon tire running on our road an inch and a quarter in thickness; I see the engines of the Lehigh & Susquehanna R. R. Co. every day—those that come up to Scranton; the road from Wilkesbarre to Scranton is leased by the latter company from our company; I have nothing to do with the repairs of any engines but our own; I don't know positively, but I should think that the tires attached by set screws would be more expensive to keep in repair than tires with Mellon's improvement; this is because the tires with set screws are more liable to get loose and back out from the wheel—the jar loosens the screws; also, when screwed in too far they are liable to crack the rim or centre of the wheel (this is objected to by Mr. Campbell as irrelevant); I have had experience in the use of tires fastened by shrinkage only; there is no difference in applying them in first cost, but there is no safety in their use; if such a tire became loose when the engine is in motion, they are liable to slip in between the driving wheel and frame; this would obstruct the road, and very liable to break some of the machinery, and nine times out of ten would throw the engine off the track; in my experience on this road the four years we never broke a tire until last winter, when we broke eight; out of those three were Mellon tires and the other five were shrunk on plain; out of these eight, two of them went off the track on account of the tire slipping in
120 between the wheel and the frame; with a Mellon it is impossible for it to slip off the wheel centre unless it is absolutely broken in pieces; we had no difficulty in getting those three engines with Mellon tire back to the shop—only with one; the others broke so near to the shop we had no difficulty with them; that one, I mean, had a plain tire; out of the whole eight I only had trouble with one.

Cross-examined:

All but eight or ten engines of those under my charge are fastened by plain shrinkage only; all the Mellon tires we have in use have a shoulder on the wheel centre, and a corresponding recess on the tire; we have none with a shoulder on the inner surface of the tire and a plain wheel centre; in all cases the projection on the wheel centre is slightly rounded; Mellon's rounded shoulder on the wheel centre might make a half hour's additional work or less in turning it; it would take about same additional time to turn out the recess on the tire; the only advantage of Mellon tire over a plain one is in the event of an accident by the tire becoming loose or breaking; those eight breakages I referred to occurred during the latter part of February, March, and April, 1875; six of them were close in neighborhood of the shops; one occurred thirty-six miles away, and I do not know where the other occurred; the causes were, cold weather, rough track, and a broken rail; I judge a Mellon tire would be as apt to break from those causes as a plain tire secured from shrinkage only; the advantage in the Mellon tire was in the ability of running home afterwards; the height of the shoulder on

our engines is from three-eighths to half an inch; the space between the driving wheel and the frame varies from two to four inches; I never made any comparison between the time the Mellon and the plain tire would wear, because our engines are all new; they were built
121 within the last ten years, mainly by the Dickson Manufacturing Co.; I know that iron tires are now obsolete; I believe that set screws are going out of use.

Re examined:

I should judge that the tire had been broken some time on the engine where we did not discover it till it came into the shop; it did not look like a fresh break; it was a Mellon tire; a leading driving wheel; the shoulder of the Mellon wheel or tire assists to bear the jar or shock while running on a curve; for that reason I think it will have a tendency to keep tight on the wheel longer; that engine that broke thirty-six miles from the shop had a plain tire secured by shrinkage only; that got off the track; it caused an obstruction on the road for about six hours, till we got it on the side of the track; it was such a break that would not, I think, have caused it to be thrown off if it had the Mellon tire on it; I am positive it would not.

Question what did it cost to get that engine back to the shop?

(Objected to by Mr. Campbell.)

Answer. It cost within a few dollars of one hundred dollars.

Cross-examined:

That was composed of the following items, viz, use of an engine a day and a night; an engineer and fireman and wrecking crew of five or six men; we had a gang of section men there part of a day fixing the track; we consider the use of an engine worth twenty-five dollars a day; that is, we pay and allow an engineer and fireman, twenty-four hours, or two days for both engine and engineer and fireman, engineer six dollars and eighty cents, and fireman three dollars and seventy cents; the five wrecking men's services, worth about two dollars a day; they were paid for two days and a half, and a gang of section men who worked there nearly a day.

S. H. DOTTERER.

Sworn and subscribed.

122 DECEMBER 2, 1875.

Present, Messrs. Fenton, Campbell, and the plaintiff.

AUSTIN MOORE, a witness called on behalf of the plaintiff, is sworn, examined, and says:

I reside in Scranton, Pennsylvania; I am a mining and mechanical engineer; I have been connected with the Delaware, Lackawanna, and Western R. R.; I am now connected with the Lackawanna and Susquehanna Coal and Iron Co.; I am there to superintend the mines and look after the locomotive engines, of which we had two; I think was connected with the Delaware and Lackawanna R. R. Co. about fifteen years; while with that company, I had experience with regard to the running of engines; that was my department for the greater part of the time; I ran an engine for a part of the time; I am acquainted with the methods of attaching tires to the driving wheels of locomotive engines in general use at the present time; I have become acquainted with these methods by examining them as I have travelled over railroads; my business, after leaving the Delaware and Lackawanna R. R. Co., took me over the greater part of the United States; the plans of attaching tires to the wheels that I am

familiar with, are those of rivets, set screws, L-shaped bolts, and Mellon's plan; I am speaking of all kinds of tires, iron and steel; I also know that tires are sometimes put on the wheels by shrinkage only; these are the present methods, so far as I am familiar with them, as now in use; I have made an estimate which will approximate to the cost of attaching a steel tire to a locomotive engine wheel by six set screws; I think it would be about sixteen dollars per wheel; that includes only the labor and material expended to do that amount of work; the method of attaching the tires by bolts is confined to iron tires, and by screws to steel tires; before a steel tire is fastened by screws, it
123 is first shrunk upon the wheel in the ordinary manner; shrinkage is common to all modes of attaching tires, with the exception of cast-iron tires; a steel tire is expanded about one one-hundredth of an inch to each foot in diameter before it is put upon the wheel; that is equivalent to a tensile strain of about ninety-six tons upon the whole steel tire, presenting a cross section of about sixteen square inches; that is an approximation; that straining of the tire has a tendency to rupture the tire, and render it less fit for use than it would be if it were put on without expansion; the tire which is put on by shrinkage is one one-hundredth part of an inch to each foot in diameter less in diameter than the wheel upon which it is put; I estimate that the amount of sixteen dollars, which I have stated as the cost of attaching a steel tire by set screws, is the saving which is derived from the use of Mellon's improvement; that is, in the cost of applying the tires to the wheels; steel tires fastened by set screws are not considered safe after they have been worn as thin as one and one-quarter inch in thickness; the tire then becomes loose on the wheel; of the methods which I have mentioned, I think that Mellon's plan is altogether the safest; the tendency of the tire to become loose is produced in a great measure by lateral strains in passing curves and crossing frogs; the shoulder provided in Mellon's patent offers a resistance to these lateral strains, and absolutely prevents the tire from coming off the wheel, unless the tire is broken in more than one place; this is true in either form of Mr. Mellon's tire; if the shrinkage lost its force, the shoulder in Mellon's tire would keep it on the wheel; in the other forms of attaching tires to wheels, either by set screws or by shrinkage alone, if the shrinkage lost its force, either by lateral strains or by wear, or if the screws became broken, it is my experience that the tires would be very apt to come off the wheels; as between the two methods of at-
124 taching tires by set screws or by shrinkage alone, I think the former mode is the preferable, although the first cost is greater; the set screws are serviceable, because they would hold the tires in position after they became loose; the set screws, also, to a limited degree, assist in bearing the lateral strains of which I have spoken; I presume that is a part of the design of people applying them; that would be the effect, at any rate.

I think that a tire secured by shrinkage could not with safety be worn so thin as one secured by set screws; I have seen one set of the Mellon tires worn down to full seven-eighths of an inch in thickness; I measured them—that is, I measured one tire, but I presume that they were all turned at the same time, and of the same thickness, but they sometimes vary; these tires were on the engine at the time I saw them; it was, I think, the engine "Pocono," of the Delaware, Lackawanna and Western R. R.; it was then in use. I did not give her a critical examination; so far as my observation went the tires were in good order; there would have been danger of those tires breaking if they had been run much

thinner. I would not want to run such tires below that thickness, and then I would want very watchful engineers. I think the Mellon tire could be worn much thinner with perfect safety than tires secured by any other method mentioned by me; steel tires are usually made from two and a half to three inches in thickness; in the case of a new tire put on by shrinkage alone, I think there could not be sufficient lateral strains, either from curves, frogs, or broken rails, to force the tire off the wheel, provided the tire was subjected to the tensile stain, which I have spoken of, in applying it to the wheel. I think there are causes which would produce that effect in such a tire, and they are the inability of skilled artisans or engineers to determine the amount of strain to which the tire is subjected in applying it to the wheel; this can only be de-
125 termined by the trial of the engine on the road. I consider the fastening of tires by shrinkage alone very unsafe; the greatest amount of repairs upon steel tires would be necessary when they were fastened by set screws.

Cross-examined:

The items of the sixteen dollars which I have named as the cost of attaching steel tires to wheels by set screws are first, forging the screws, turning, cutting threads, fitting nuts and material, ten dollars; drilling holes in wheel periphery, tapping them to receive screws, five dollars and fifty cents; labor for repairing tools for same, fifty cents. I don't know that there is much, if any, choice as to the two forms of Mr. Mellon's invention; the most economical method is that of leaving a rim upon the wheel-centre and making a corresponding depression in the tire, because in turning out the tire you waste the metal of the tire which is the most valuable; there would be from one-eighth to three sixteenths of an inch in thickness wasted; tires are usually bought, I believe, by railroad companies, in the rough; the shoulders can be made either rounded or angular, according to the tools in the lathe at the time; it is better to make them slightly rounding; it adds strength to the tire; it would not cost any more to make the shoulder round than angular; to turn a projecting rim on the wheel-centre and a corresponding depression in the tire would take about three hours to each wheel; when Mellon's tire is in position you could tell by a close examination whether it was made with the projection on the wheel or the tire; there might be cases when you could not, when the tire has the flange on the outer periphery instead of being secured by a flange on the wheel-centre in the inner periphery; steel tires have almost superseded the use of iron, and have been doing so for the past ten or twelve years; the insertion of a set screw into a steel tire does not materially weaken the tire; it does to some extent, as it takes away some of the material.

126 The most common form of attaching steel tires is by set screws. I think the next most common mode is by shrinkage alone; the cost of attaching a tire by Mellon's plan would be somewhat more than by shrinkage alone, but taking the ease of applying the Mellon tires into consideration, I think the cost in one case would be about the same as in the other; in applying the Mellon tire I would not use more than seventy-five per cent. of the expansion or shrinkage which I would use in applying the tires by shrinkage alone. I base this judgment not upon any experience of tires, but upon the fact that it is not necessary to have the Mellon tire hug the wheel so tight; the reason why tires applied by shrinkage alone cannot safely be run so thin as tires fastened by set-screws, is that in case of the breakage of the tire or the tire becoming loose, the set-screws would afford some protection against the lateral thrust of the en-

gine; until a tire fastened by shinkage alone became loose it would run as well as a tire fastened by another method; the commonest cause of the loosening of tires is the stretching of the tire by being laminated upon the rail and the lateral thrust exerted upon the tire by the locomotive in passing frogs and curves; the engine "Pocono" was built by Danforth, Cook & Co., of Paterson, New Jersey; she was a freight engine. I made the examination of this engine in 1867—the time of the year I do not remember—at Scranton. I do not know whether the tires were loose or not. I do not think it was quite safe to use that engine in that condition, but by extreme caution on the part of the engineer in charge, the Mellon tires might be worn to that stage with comparative safety. I would not like to trust the average engineer with tires in such condition; when I was travelling over the United States I was engaged in the manufacture of car springs at Bridgeport, Connecticut, and in introducing a safety attachment to railroad switches; the method of attaching tires by shrinkage only has come into use since I was
127 connected with railroads. I have no personal knowledge of the working of tires fastened in that manner. I have no interest in this suit.

Re-examined:

As an engineer, I can say that tires secured in Mr. Mellon's plan can be worn safely thinner than when secured in any other method mentioned by me; steel tires can be worn thinner safely than iron tires, because of the greater tensile capacity of the steel; the reason why the Mellon tire need not hug the wheel so closely as a tire fastened by shrinkage only is that it has the shoulder; if the tire has either the shoulder or screws, it helps the force of the shrinkage to bear the lateral thrust which loosens the tire from its seat on the wheel; the result of that is that the Mellon tire does not come loose from the wheel so soon as a tire fastened by shrinkage alone, or by any other method; when a tire comes loose on the wheel, it needs to be taken off, reëxpanded and lined up by inserting thin pieces of iron between the wheel-centre and the tire, to tighten it.

AUSTIN MOORE.

EDWARD MELLON, the plaintiff, is recalled in his own behalf, and says:

Question. How much thinner, if any, can a tire secured to a wheel by your improvement be worn with safety than tires secured to wheels by means of shrinkage and set-screws or bolts or by shrinkage alone?

Answer. A tire which they call secured by shrinkage alone—which is the absence of all security—cannot be run at all with safety; the reason is that it is impossible to tell the tensile strain of a tire around a locomotive wheel; the wheel centres are not alike solid; some wheels in being cooled after being cast leave a strain upon the
128 arms, so that the arms pull in upon the wheel rim; others when cooled after being cast leave a strain upon the rim, which then hugs upon the arms, and the intensity of this drawing upon the arms varies so much that it could not be traced; some wheels are in equilibrium, so that there is no strain in a state of rest; a mechanic in finishing up a wheel to fit a tire cannot tell whether the arms are pressing against the rim or drawing in upon it; two wheels turned to fit tires of the same size might be different; one might have the arms pressing against the rim, and the other have the arms drawing upon it; in such a case the tire would not have the same tensile strain on both wheels; in the former

case the tire would meet the wheel rim, and the arms also; in the other case the tire would only have to contend with the solidity of the rim to compress it and relieve itself; that is the reason why tires on the same engine will not wear equally, and no man can determine such condition of the wheels.

Another cause for the insecurity of tires fastened by shrinkage alone is that the accidental heating of an axle would warm the hub of a wheel. warm that and part of the arms, and consequently the whole inner part of the wheel, while the tire might be very cold—down to zero; this would be a sufficient contrast between the temperatures of the two portions of the wheel to burst a two and a half or three inch tire; in such circumstances as I have spoken of there would be nothing to hold the tire on the wheel in the case of a tire fastened by shrinkage alone, as there would be in case of tire secured by screws or by my improvement; the same causes would break my tire as would break the others; in 1866, I supplied an engine on the Delaware, Lackawanna and Western R. R., named "Pocono," with a set of tires—iron—in order to test how thin those tires could be worn with safety, with my improvement on them, and this engine ran for about six months afterwards, until she
129 wore one of those tires through to the wheel, in one segment, and the tire was quite loose; she came home in safety; the master mechanic was not quite satisfied with this test, and I supplied the worn-out tire with another about as good as the other tires on the engine, and allowed the engine to run on again to determine the safety of this device; in about six weeks afterwards the engine wore two tires upon the same side similar to the first, so that the face of the wheel in one segment of each was in contact with the rail; then the master mechanic allowed me to put on two other old tires in place of those, and she went on doing her work some time, until she was destroyed in an accident; steel tires can be worn thinner than iron, because the former metal is harder than the latter; steel will not stretch so soon as iron under the lamination of the rail; a tire secured by shrinkage only could not be used with safety after it was reduced to an inch and a quarter in thickness; it would become loose then, and have to be taken off and thrown away; a tire properly secured by my improvement on a passenger engine could be run down to from seven-eighths to three-quarters of an inch in thickness; I don't think there are any passenger engines run where the tires are secured by shrinkage only; I do know of one—the "John J. Philips"—on the Delaware, Lackawanna and Western R. R.; I don't think that a tire fastened by set-screws to the wheel of a passenger engine could be safely worn thinner than an inch and a quarter in thickness, for the reason that the set-screws are not continuous upon the wheel, so that the resistance is not in a straight line against the shock; I have seen other instances than the one I have named where my tires have been worn very thin; the reason why my tires can be worn thinner than the others is because there is nothing tends to loosen them, but the actual rolling upon the rails, and that has the tendency to turn the edges of the tire inward instead of rising in the centre; I have made an
130 estimate of the actual cost of fastening a steel tire to a wheel centre by set-screws; it amounted, for the simple labor and material in using six screws, to fourteen dollars; if jamb nuts are added, which ought to be, it would amount to three dollars more; in my estimate given before in Philadelphia, I added about fifty per cent. for profits.

Cross-examined:

I don't consider that one form of my invention is any better than the other; one could be applied to some engines when the other could not; in putting on a flange upon the inner surface of a tire, I would advise that it be made from a quarter to three-eighths of an inch in height, but a smaller height could be used for running short distances; in ordinary circumstances, if the tire were merely loose and not broken, a sixteenth of an inch would be sufficient, but if the tire was broken and sprung open considerably, it would require the greater height I have named; I think that Mr. Moore examined the "Pocono" at my request; that was a sort of test; she was running heavy coal trains from Scranton to Great Bend, and was heavier than an ordinary passenger engine; I think that fastening tires by set-screws is the next best method to mine.

Recross-examined:

Unless a tire attached by shrinkage should break or get loose, it could be run safely until it was worn down to an inch and a quarter in thickness.

EDWARD MELLON.

Plaintiff's counsel calls upon defendants' counsel to state whether o not any of the engines purchased by the defendants from the Baldwin Locomotive Works, McKay & Aldus, T. B. Grant & Co., and E. S. Norris are provided with steel tires fastened with set-screws, and also the average weight, when new, of the two and a half and three inch steel tires on the defendants' engines.

131 *Defendants' proofs.*

MARCH 10TH, 1876.

Present, Messrs. Fenton, Campbell, Mellon, and Goodwin.

FRANKLIN ROOP, a witness called on behalf of defendants, is sworn, examined, and says:

I am master machinist on the North Pennsylvania Railroad, and have been so for eighteen years. I am familiar with tires and wheels of locomotive engines and the mode of their attachment.

Steel tires are in almost universal use, except a few chilled tires. The general mode of attachment now is by shrinkage alone. I am familiar with what is claimed as plaintiff's patent. We do not use it on our road.

Q. Please state whether you consider that Mellon's improvement has any value.

(Objected to by Mr. Fenton, on ground that witness has never used, and, so far as appears, has never seen plaintiff's improvement. Answer admitted on ground that the objection goes to the weight of the testimony rather than its competency.)

A. I do not consider it of any value. A tire cannot be attached with Mr. Mellon's improvement any more cheaply than by shrinkage alone.

Q. As an expert, do you consider that a tire with Mellon's improvement will wear longer than a tire attached by shrinkage alone?

(Objected to. Answer admitted.)

A. I don't think it will wear any longer. We wear the tires on our road about an inch and a quarter in thickness. We have had instances of breakage of steel tires on our road. The engines in those cases have run safely home to the shops with the broken tires.

Q. Do you consider that Mr. Mellon s tire would have prevented the accidents or increased the safety of the engine afterwards?

(Objected to on same ground. Answer admitted.)

A. I don't think it would. We have had one or two instances where tires became loose on the road. The engines in those cases
132 reached home safely. I consider the attachment by shrinkage alone sufficient.

Cross-examined:

We have fifty engines now on North Pennsylvania Railroad. About two-thirds of those engines have their tires fastened by set-screws, and one-third by shrinkage alone. When I said that the general mode of attachment was by shrinkage alone, I did not refer to any road in particular. I am not familiar with other roads. I made the statement from reports of master mechanics at their convention, recommending that by shrinkage alone. I do not know how the tires are fastened on the Reading Railroad, nor on the Delaware, Lackawanna and Western, nor on the Delaware and Hudson, nor the New Jersey Central, nor the Pennsylvania and New York road, nor the Morris and Essex. When I said engines on our road had broken tires, I meant cracked square across, and not split. When I said I knew of two instances of tires becoming loose on our road, I did not mean loose enough to revolve around the wheel. One of these two was fastened by set-screws and the other by shrinkage. The broken tires I referred to occurred in three instances on two engines. Of the three broken tires all were fastened by set-screws. I have no personal knowledge of tires fastened by Mellon's patent.

FRANKLIN BOOP.

Sworn and subscribed before me this tenth day of March, 1876.

ROBERT N. WILLSON, *Master*.

CHARLES GRAHAM, a witness called on behalf of defendants, is sworn, examined, and says:

I am master mechanic on the Lackawanna and Bloomsburg Railroad, now consolidated into the Delaware, Lackawanna and Western
133 Railroad. I have been master mechanic for eleven years. I am familiar with mode of attaching tires to locomotive wheels, and I know what Mr. Mellon's improvement is. The tires on my division are steel tires, attached by shrinkage alone.

Q. Do you consider Mr. Mellon's improvement of any practical value?

(Objected to. Answer admitted.)

A. I have never known a case where it would have been of any value. I have never used it. I think there is an additional expense attendant upon attaching a tire by Mellon's improvement over shrinkage alone. I think that shrinkage alone is all that is sufficient. I think that is the best method; it is universally adopted now.

Q. Do you think that a tire attached by Mellon's improvement will run longer and wear thinner than one attached by shrinkage alone?

(Objected to.)

A. I think not. I have run tires secured by shrinkage alone to a thickness less than an inch and an eighth. The tire that I have reference to ran until it broke. I can't say that Mellon's improvement adds to the safety of running an engine. I have never known an instance where it could have been used with any advantage. We have had instances on our road of broken tires which were secured by shrinkage alone. In those

instances the engines have run safely home with a broken tire. In each case it was a break clear across the tire. One time it went all to pieces, and the engine came home without the tire; the other tires were broken only in one place. I remember no instances of steel tires becoming loose on our road. Steel tires have almost entirely superseded the use of other tires. The first tires I put on by shrinkage alone were about nine years ago. I do not know that that method was used before then. They were formerly attached by set-screws.

Cross-examined:

When I said we used simply shrinkage, I referred to the Lack-
134 awanna and Bloomsburg branch only. I think there is only one engine on that branch whose tires are secured by set-screws. We have twenty-six engines altogether. I have run an engine for a week or two at a time. I ran an engine during the past eleven years occasionally for a day or a few hours. I can't tell how often that occurred during the eleven years. It was oftener than once a year; months might intervene between the occasions. My experience has been more in building and keeping tires in order than in running an engine. The name of the engine whose tire was run to an inch and an eighth was "Major McNeil"; she belonged to our branch; she weighed seventy-one thousand pounds; about the average size. It is not a lighter engine than any other on our road. I measured the thickness of the tire when it came off. That was January 28th, 1875. I measured the one that broke. The others were about the same thickness. The tire which was broken was fastened by shrinkage only. It was a plain tire, without Mellon's improvement. That set I have reference to is the first set of steel tires I have taken off. The tire which broke in four pieces was the one just spoken of. I remember five instances of tires broken on our road which were secured by shrinkage only. Of those five three were on one engine, two on two others; and there was also one tire which broke secured by set-screws. The tire which broke all to pieces was on the main driving-wheel. The connecting-rod of the engine is attached to the wheel on which that tire was. There were two driving-wheels on each side; it was the forward one of the driving-wheels. I have known instances of the main driving wheel in the position of that one having no outside or usual flange on the tire. If there was no usual flange on front driving-wheel the back driving-wheel and the front guiding-wheel would keep the engine on the track.

Q. Suppose any one or more of the tires on the truck-wheels broke, could the engine be run safely home?

A. It would depend on which tire it was. If it was the front tire, the engine could not be run as safely forward as backward; if it was the back tire, she could not be run as safely backward as forward.
135 There are some trucks on our road with a single pair of wheels. If either one of those broke the engine could be run backward with safety; the engine could not be run forward with safety in that case. When I said the universal method of attachment was by shrinkage only, I referred to my own experience on my own road and to conversation with other master mechanics. I have never conversed with any master mechanic on the Reading Railroad. I don't know how they fasten the tires on that road.

Re-examined:

Truck-wheels are sometimes cast solid like car-wheels and sometimes made with a tire.

CHAS. GRAHAM.

After an intermission, CHARLES GRAHAM, the witness last examined, was recalled. He says:

When I said that I had not used Mr. Mellon's improvement, I answered with reference to driving-wheels. I have used it on engine truck-wheels with steel tires; that is, I have used the curved projection on the wheel-centre with a corresponding recess on the tire. I have not yet found any benefit from that use.

Cross-examined by Mr. FENTON:

It is left to my judgment to decide what form of tires shall be used on our road. We made the tires just spoken of at our own shops. We paid no royalty for them, and were never asked for it. I put the tires on in that way, rather than by plain shrinkage, just to try an experiment. We have never received any benefit from them, because the tires have not worn thin enough to tell. We had two engines built at the Dickson Manufacturing Company, but I don't know whether the truck-wheels had the tires made in this way or not. I don't remember having given directions to John Swift, of the Dickson Manufacturing Company, to make the truck-wheel tires in that way. I do not certify the bills when new engines are made, only that the engines have been received. The forward truck-wheel is the most dangerous wheel if the tire is broken.

136 By Mr. CAMPBELL:

We have seven engines with Mellon's improvement on the truck-wheels.

CHAS. GRAHAM.

Sworn and subscribed to before me this tenth day of March, 1876.

ROBERT N. WILLSON,
Master.

STILLMAN A. HODGMAN, a witness called on behalf of defendants, is sworn, examined, and says:

I am the master mechanic of the Philadelphia, Wilmington and Baltimore Railroad, and have been so since November, 1872. I was connected with the same road before that, as general foreman of machinery repairs, since 1864. I am familiar with the mode of attaching tires to locomotive-wheels. Shrinkage alone is the mode in general use on our road. I know what Mellon's improvement is. I do not think that his improvement, as it is called, has any practical value.

(Objected to.)

It would be more expensive to get Mr. Mellon's tire ready to put on the wheel than it would the plain tire. There would be more lathe-work. There would be no difference in the actual shrinkage on to the wheel, after the tire was ready to put on, between Mr. Mellon's tire and the plain tire. I do not think Mellon's improvement would make the tire last longer than it would last if attached by shrinkage alone.

(Objected to.)

I have known instances of broken and loose tires, which were attached by shrinkage alone, upon our road. In all of those cases the engines have been brought back to the shop, but not run back in all cases. We have no flanges on our forward driving-wheels, so that if the tire on the hind wheel broke there would be nothing to keep the engine on the track.

137 We have run them back sometimes by chaining the engine to the tender and raising the wheel with the broken tire from the track. We had one instance where the tire cracked and we run the engine

back on the track without the chaining. In all other cases, when it has been possible to run the engine at all, we have run them to the shop by the use of the chains. In my opinion, Mellon's improvement, when the projection was as much as three-eighths of an inch, would not add to the safety in running an engine.

Cross-examined:

There are seventy-five engines on our road. We have a class of engines—eight or nine, perhaps ten—which have the tires put on a tapered wheel-centre. They are chilled-iron tires, most of them made by the Baldwin Works. I think the last one was made about four years ago. The tires in these engines are forced on by screw-pressure, and they are held in their place on the wheel by set-screws. The screws are put there for that purpose, but I don't think they hold the tires any. We have no others besides those first spoken of, which are fastened by set-screws. In regard to the rest of our seventy-five engines, the tires are all put on and held in place by shrinkage alone. They are all steel tires except one set. These tires are put on in our shops, except in the case of engines which come from other shops new. Five engines are running now on the tires which were on them when they came to us. I have never examined these particularly to see how the tires were put on. They were made at the Baldwin Works. I think they must have been put on by shrinkage, because I was particular to order that they should not be put on tapering. In the case of the tires which are put on at our shop, some of them are bored by us and some come to us already bored. When I order tires in the rough, I always order them an eighth of an inch smaller in diameter than we want them when bored. When I said that getting Mellon's tires ready would be more expensive because of the lathe-work, I referred to the boring.

Q. Please state how it would cost you more to bore out a tire and stop before you got all the way through than if you had run the lathe to cut it completely through.

138 A. It takes more time to run up to a shoulder at a given distance and stop than it would to run straight through. In the cases of broken tires, to which I referred, I think they were all broken in two pieces, except one, which was cracked in one place. It is so long since we have broken any that I can hardly remember. We make the diameter of a tire about a thirty-second of an inch smaller in diameter than the wheel-centre upon which we put it; that is, for a wheel of a diameter of five and a half feet. The difference is a little less for a five-foot wheel. I cannot tell how much the ends of a tire would spread in case of a fracture; it varies in different cases; it might be a sixteenth of an inch, an eighth of an inch, or three inches.

Q. From your knowledge as an expert, do you think that in the case of a single fracture in the tire of a five-foot wheel it would spread ordinarily more than one-eighth to one-tenth of an inch, in cases where the tire was one thirty-second of an inch less in diameter than the wheel upon which it was put?

A. It would depend on the rate of speed at which the engine was running.

Q. Please answer the question with reference to an engine running at the ordinary speed of eighteen or twenty miles an hour.

A. I can answer the question, but it is all mere supposition. I think it would spread more than one-eighth to one-tenth of an inch when the engine was running at that rate.

Q. How much more do you think it would spread?

A. I cannot give any intelligent answer to the question. It would depend upon the circumstances of each case. The chances are that the tire would break in several pieces.

Q. Have you had any practical experience in the use of tires secured by Mellon's improvement?

A. No, sir; I have never used any.

Re-examined:

In the cases where the wheel is made tapering, the tapering is down towards the outside, so that it would be impossible for the tire to pass over the wheel; it would fall off the outside.

S. A. HODGMAN.

139 Sworn and subscribed to before me this tenth day of March, 1876.

ROBERT N. WILLSON,
Master.

CHARLES T. PARRY, a witness called on behalf of the defendants, is sworn, examined, and says:

I am a member of the firm of Burnham, Parry, Williams & Co. I have been engaged since 1836 in the business of building locomotives. During that time I have been at the Baldwin Works, which have turned out a great many engines. I am familiar with the modes of attaching the tires of locomotive wheels to the wheel-centres. Steel tires are now in very general use. In most of the wheels tires are put on by shrinkage only. I know what Mr. Mellon's alleged improvement is. We have used the square flange on the inside of the tire at the outer edge. The first that I remember of doing it was in the fall of 1863.

(Mr. Fenton objects.)

That was for Dom Pedro's second railway in Brazil. We used it some time after that for fastening on chilled-iron tires, but not the steel tires. We do not use it at all now. The first time we used that plan was the first time when we used a steel tire. I think we got the tires from Krupp, and on making inquiries as to what allowance we should make for shrinkage, my impression is that he reported to us that the best way was to leave a projecting shoulder on the inside of the tire at the outer edge. I think we got the tire from Krupp's agent in this country. My special department in our works was to give out plans and directions as to how the work should be done.

Q. In your opinion has Mr. Mellon's improvement any practical value?

(Objected to.)

A. I have never thought it had. I have never had any practical
140 railroad experience; but as a mechanical engineer I have never thought it had any special merit. The use of Mellon's improvement does not diminish the cost of attaching a tire to the wheel by shrinkage; it rather increases it. In my opinion, there is nothing whatever in the putting on of the flange which would increase the durability of the tire in any way.

(Objected to.)

There might be cases where it would increase the safety of the tire, but I have no railroad experience in that respect. There have been approaching three thousand locomotive engines built at our works since I have been connected with them. There were some tires put on by Mr. Baldwin, before I went to the works, with a large flange fastened by bolts.

(Mr. Fenton objects, and asks that the last sentence be struck out.)

Since that time I should say that we had put on about a dozen steel tires and about twenty or thirty cast-iron tires with a flange. I know the iron ones were all bolted. I think that some of the steel ones were bolted, and some shrunk. We don't use the flange at all now. It is about ten years, I should think, since we used it.

Cross-examined:

I should think that not over two hundred of the three thousand engines spoken of by me had the tires fastened by set-screws. Prior to 1863, 1864, and 1865 we used wrought-iron tires principally; some cast iron. We riveted most of the wrought-iron tires. Our works have built a great many engines for the Lehigh Valley Railroad Company up to the present time. I think that during the past two or three years we have generally used the nipple-bolt to fasten the tires on the wheel-centre. I think that we have built some engines for the Lehigh Valley Railroad Company with steel tires, which were fastened with set-screws. My belief is that all the rest of the engines which we built for that company with steel tires had those tires fastened by nipple-bolts.

Q. Look at this drawing of the engine "Consolidation," built by you for the Lehigh Valley Railroad, and say if the steel tires on that engine are not fastened by nipple-bolts.

141 A. They are not fastened by what we term nipple-bolts, but are fastened by set-screws. The tires are slipped on without shrinkage, and jamb-nuts are put on the set-screws.

Q. That is the first of a class of similar engines you built for the Lehigh Valley Railroad?

A. Yes.

Q. State whether or not the fastening of steel tires by nipple-bolts or set-screws, either where the tire is slipped on the wheel or shrunk on the wheel, is the most approved form of fastening a steel tire to a locomotive engine, in your opinion.

A. We are called upon to fasten them more now with nipple-bolts than set-screws.

Q. What, in your opinion, is the best method?

A. I think the best is to shrink them on and fasten them, when required, with nipple-bolts; we use the set-screws when the tire is slipped on.

Q. Ought not, in your opinion, every plain steel tire to be fastened by set-screws or nipple-bolts?

A. In my opinion they are of no great use.

Q. Why, then, do you apply them?

A. To meet the different opinions of men; some think they are useful, some think they are not. In my opinion, if a tire won't stay on by shrinking it won't stay on by nipple-screws or bolts.

Q. What proportion of the steel tires you make now are fastened by plain shrinkage only, and what by nipple-bolts, in addition to shrinkage?

A. I have not had much to do with these details of late; my impression is we are putting nipple-bolts to most. We attach them in that way only when so ordered by purchasers. We make these attachments in accordance always with the instruction or known wishes of purchasers. When they order a particular kind of fastening we assume they continue to desire the same.

Q. Do you build engines for all or nearly all the principal railroads in Pennsylvania and New Jersey?

A. We have until very recently. When I said the Mellon
142 tire cost more than the plain tire in getting ready for attachment, I meant ten minutes to half an hour's extra labor with the lathe in turning the shoulder.

Re-examined:

It has been over three years since I took any part in the details of manufacturing engines.

CHAS. T. PARRY.

Sworn and subscribed before me this tenth day of March, 1876.

ROBERT N. WILLSON,
Master.

PHILIP HOFECKER, a witness called on behalf of the defendants, is affirmed, examined, and says:

I am master machinist of the Lehigh Valley Railroad. Have been on that branch since 1864, or a little before, in that position. I am acquainted with Mr. Mellon's improvement, so called. There are several of them in use on the road. I mean quite a number of them. We also use the tire put on by shrinkage alone. I do not think Mellon's improvement has any practical value. I do not think there is much difference in the cost of attachment by shrinkage only and Mellon's device; it is a little more trouble to get the flange to fit. I do not think a tire attached by Mellon's plan is any safer than one attached by shrinkage alone.

Q. Will a tire with Mellon's device wear longer than a tire attached by shrinkage alone?

(Mr. Fenton objects.)

A. We have not had a test of that, but I don't see any reason why it should wear longer. We have had cases of tires attached by shrinkage only becoming loose. The engines were run home to the shops, of course not very fast. We would not use an engine with a loose tire, whether it had Mellon's improvement or not.

143 Cross-examined:

Q. Could a Mellon tire, with a flange three eighths of an inch in depth, come off a wheel, even if it were loose?

A. I think it could, because sometimes the tire works off towards the outside—I mean towards the rail. This would happen in going round a curve. In ordinary running it could not come off unless it were very loose.

Q. As between a loose tire without Mellon's flange and a loose tire with a plain flange, would not a tire with a shoulder be safer of the two?

A. I do not think so, because when a tire loses its shrinkage nothing will hold it.

Q. If a plain tire, fastened by shrinkage, comes loose, would not it necessarily come off in turning a curve?

A. It would either come off or slip in.

Q. The steel tires on the Lehigh Valley Railroad have been attached by shrinkage only since the fall of 1874?

A. Yes; the first steel tires we put on by shrinkage alone were in 1864. We put all on by shrinkage alone since the fall of 1874.

Q. You know nearly all the engines on the Lehigh Valley Railroad?

A. I know all on the Beaver Meadow Branch.

Q. Do you know engines Nos. 67 and 69—that is, the "Shamokin" and the "Junction," and No. 3, "Henry King"?

A. They run on other divisions. I do not know them, nor engine 82, the "Bee."

Re-examined:

Q. Have you ever known an instance where Mellon's device has been of any use?

A. No, sir.

Q. What is the depth of the Mellon flange you use?

A. It is from one-sixteenth to a scant one-eighth of an inch, according to the size of the tire.

144 Recross-examined:

Our two-and-three-quarter-inch-thick, five feet outside diameter steel tires weigh about nine hundred and sixty-four pounds; these are five and three-quarter inches wide, which is the usual width.

Q. You are acquainted with the engine "Pacific," No. 8; you put a set of steel tires on her?

(Mr. Fenton desires to know what it is proposed to prove by this witness.

Mr. Campbell states that he proposes to prove that there is an error in the statement marked Exhibit A, furnished by him to the complainant's counsel, and offered in evidence before the master, in this, that opposite the figure eight, and in the column headed "Date when first so provided," the date January, 1867, was given instead of May, 1864.

Mr. Fenton objects to an explanation or evidence which will tend to prove want of novelty.

Mr. Campbell replies it is not offered for such purpose, but to correct the exhibit.

Mr. Fenton's objection renewed.)

A. Yes; the tires first put on her had a square flange on the inner face of the tire, at the outside edge.

Q. When were these put on?

A. May, 1864; I think the 29th. The boiler of the engine gave out and we rebuilt her; the wheels were taken off and a new set of wheels and tires were put on in 1867. I have no doubt it was January, 1867, the date given in the exhibit. I know it was 1867. If I had my books I could give the exact date. I ran an engine about a year on the Beaver Meadow Division, before the consolidation with the Lehigh Valley Railroad.

PHILIP HOFECKER.

Affirmed and subscribed before me this tenth day of March, 1876.

ROBERT N. WILLSON,
Master.

145 ALEXANDER MITCHELL, a witness called on behalf of the defendants, is sworn, examined, and says:

I am superintendent of the Wyoming Division of the Lehigh Valley Railroad, and as such have superintendence of the locomotives on that division, as also of the Pennsylvania and New York Canal and Railroad. I have been superintendent since 1871, and been connected with the Lehigh Valley Railroad since 1864, as master mechanic. I am a practical machinist. I know the flange on the inner face of the tire in use on the Lehigh Valley Railroad. I have not found that this has any practical value in my experience. We have in use engines where the tire is

attached simply by shrinkage. I think there is a little difference in the cost of attachment in favor of simple shrinkage. In boring the tire out with a shoulder of this kind it would take a little longer to do so to get the proper width in relation to the wheel-centre than to bore it out plain without the flange. The depth of shoulders in use I know of is one-sixteenth inch. Our tires are ordered one-eighth of an inch less in diameter than the wheel centres.

Q. Will a tire with Mellon's attachment wear longer than one without it?

(Mr. Fenton objects.)

A. I cannot see in my experience anything to make me say it will wear any longer. We have had instances of broken tires on my division—one with Mellon's improvement and one secured by simple shrinkage. In the case where Mellon's device was used, a piece about two feet in length was broken out of the tire; it broke the cylinder, guide, footboards, rods, and cab. The front wheels were jacked up and she was towed to the shop on the back ones; these were down on the rails. I have known no instance in which Mellon's device was a practical benefit to the road. I have had no loose tires on my division on any engine.

Cross-examined:

In the other case of a broken tire the tire cracked and spread an inch and a half. They were running at a high rate of speed.
146 It was the forward driving-wheel. This happened, I think, in February, five years ago. It was engine No. 203. It was a Pennsylvania and New York engine.

Q. You have said that it cost a little more to bore out a Mellon tire than a plain one; is not that fully compensated in the increased ease in setting the tire?

A. I do not think so. None of the engines on our road fitted with the Mellon tire have had the tire worn out and taken off. With proper shrinkage the shock of the rail against the flange of the tire would not tend to loosen the tire. I do not know anything that causes the loosening of the tire, excepting improper shrinkage or imperfect metal. With proper shrinkage there is no ordinary shock to which an engine might be subjected which would loosen a tire. The average weight of our passenger engines runs from twenty-eight to thirty-five tons. The freight engines run from thirty-four to forty tons. Forty is the largest, such as the "Consolidation," except two coal engines—81 and 82—which weigh forty-two tons. All the steel tires I have put on are three-inch tires and weigh nine hundred and ninety-six pounds; about one thousand. They are five and three-quarter inches wide and sixty-two-inch diameters.

Q. Do you know engines Nos. 6, 67, 69, 70, and 82?

A. I know 6, the "Wilkesbarre"; 67, "Junction"; 69, the "Shamokin"; 70, the "Sunbury"; 82, the "Bee." Of these, 67 is fastened by nipple bolts, also 69 and 70. No. 6 has the tires attached by shrinkage, also No. 82, which had a taper-centre with bolts originally. It was altered to shrinkage, September, 1867.

Re-examined:

The tires attached by shrinkage only have not worn out more than the Mellon tires. We now use simple shrinkage; no bolts, no fastenings, no shoulders. We consider that the best method of attachment; that is my experience. I have run an engine in the Mahanoy Division

Q. Do you know engines Nos. 67 and 69—that is, the "Shamokin" and the "Junction," and No. 3, "Henry King"?

A. They run on other divisions. I do not know them, nor engine 82, the "Bee."

Re-examined:

Q. Have you ever known an instance where Mellon's device has been of any use?

A. No, sir.

Q. What is the depth of the Mellon flange you use?

A. It is from one-sixteenth to a scant one-eighth of an inch, according to the size of the tire.

144 Recross-examined:

Our two-and-three-quarter-inch-thick, five feet outside diameter steel tires weigh about nine hundred and sixty-four pounds; these are five and three-quarter inches wide, which is the usual width.

Q. You are acquainted with the engine "Pacific," No. 8; you put a set of steel tires on her?

(Mr. Fenton desires to know what it is proposed to prove by this witness.

Mr. Campbell states that he proposes to prove that there is an error in the statement marked Exhibit A, furnished by him to the complainant's counsel, and offered in evidence before the master, in this, that opposite the figure eight, and in the column headed "Date when first so provided," the date January, 1867, was given instead of May, 1864.

Mr. Fenton objects to an explanation or evidence which will tend to prove want of novelty.

Mr. Campbell replies it is not offered for such purpose, but to correct the exhibit.

Mr. Fenton's objection renewed.)

A. Yes; the tires first put on her had a square flange on the inner face of the tire, at the outside edge.

Q. When were these put on?

A. May, 1864; I think the 29th. The boiler of the engine gave out and we rebuilt her; the wheels were taken off and a new set of wheels and tires were put on in 1867. I have no doubt it was January, 1867, the date given in the exhibit. I know it was 1867. If I had my books I could give the exact date. I ran an engine about a year on the Beaver Meadow Division, before the consolidation with the Lehigh Valley Railroad.

PHILIP HOFECKER.

Affirmed and subscribed before me this tenth day of March, 1876.

ROBERT N. WILLSON,
Master.

145 ALEXANDER MITCHELL, a witness called on behalf of the defendants, is sworn, examined, and says:

I am superintendent of the Wyoming Division of the Lehigh Valley Railroad, and as such have superintendence of the locomotives on that division, as also of the Pennsylvania and New York Canal and Railroad. I have been superintendent since 1871, and been connected with the Lehigh Valley Railroad since 1864, as master mechanic. I am a practical machinist. I know the flange on the inner face of the tire in use on the Lehigh Valley Railroad. I have not found that this has any practical value in my experience. We have in use engines where the tire is

attached simply by shrinkage. I think there is a little difference in the cost of attachment in favor of simple shrinkage. In boring the tire out with a shoulder of this kind it would take a little longer to do so to get the proper width in relation to the wheel-centre than to bore it out plain without the flange. The depth of shoulders in use I know of is one-sixteenth inch. Our tires are ordered one-eighth of an inch less in diameter than the wheel centres.

Q. Will a tire with Mellon's attachment wear longer than one without it?

(Mr. Fenton objects.)

A. I cannot see in my experience anything to make me say it will wear any longer. We have had instances of broken tires on my division—one with Mellon's improvement and one secured by simple shrinkage. In the case where Mellon's device was used, a piece about two feet in length was broken out of the tire; it broke the cylinder, guide, footboards, rods, and cab. The front wheels were jacked up and she was towed to the shop on the back ones; these were down on the rails. I have known no instance in which Mellon's device was a practical benefit to the road. I have had no loose tires on my division on any engine.

Cross-examined:

In the other case of a broken tire the tire cracked and spread an inch and a half. They were running at a high rate of speed.
146 It was the forward driving-wheel. This happened, I think, in February, five years ago. It was engine No. 203. It was a Pennsylvania and New York engine.

Q. You have said that it cost a little more to bore out a Mellon tire than a plain one; is not that fully compensated in the increased ease in setting the tire?

A. I do not think so. None of the engines on our road fitted with the Mellon tire have had the tire worn out and taken off. With proper shrinkage the shock of the rail against the flange of the tire would not tend to loosen the tire. I do not know anything that causes the loosening of the tire, excepting improper shrinkage or imperfect metal. With proper shrinkage there is no ordinary shock to which an engine might be subjected which would loosen a tire. The average weight of our passenger engines runs from twenty-eight to thirty-five tons. The freight engines run from thirty-four to forty tons. Forty is the largest, such as the "Consolidation," except two coal engines—81 and 82—which weigh forty-two tons. All the steel tires I have put on are three-inch tires and weigh nine hundred and ninety-six pounds; about one thousand. They are five and three-quarter inches wide and sixty-two-inch diameters.

Q. Do you know engines Nos. 6, 67, 69, 70, and 82?

A. I know 6, the "Wilkesbarre"; 67, "Junction"; 69, the "Shamokin"; 70, the "Sunbury"; 82, the "Bee." Of these, 67 is fastened by nipple bolts, also 69 and 70. No. 6 has the tires attached by shrinkage, also No. 82, which had a taper-centre with bolts originally. It was altered to shrinkage, September, 1867.

Re-examined:

The tires attached by shrinkage only have not worn out more than the Mellon tires. We now use simple shrinkage; no bolts, no fastenings, no shoulders. We consider that the best method of attachment; that is my experience. I have run an engine in the Mahanoy Division

a week or two at a time in the year—nine or ten months altogether. I ride on the engines about one hundred and fifty to three hundred miles a week.

ALEXANDER MITCHELL.

147 Sworn and subscribed before me this tenth day of March, 1876.

ROBERT N. WILLSON, *Master.*

J. I. KINSEY, a witness called on behalf of the defendants, is sworn, examined, and says:

I am a master machinist in the employ of the Lehigh Valley Railroad, on the Lehigh division, for nearly twenty years. I have ninety-five locomotives under my charge. I am familiar with the methods of attachment, and have used the square shoulder on the face of the tire on the outside edge. Our object in using it was to facilitate the setting of the tire. We no longer use it, and attach the tires by shrinkage alone since November, 1874, when this case was decided. We had used Mellon's device since October, 1865. We now use clamps on the inside of the face of the wheel to set the tire by. Three clamps are used. They are screwed into position with an ordinary nut and wrench. It does not require a skilled mechanic to do this; a common laborer can do it. It will take, at the outside, ten to fifteen minutes to put these clamps on and take them off. They answer the same purpose as Mellon's shoulder for setting the tire. These clamps are in common use, and I had used them before using Mellon's improvement. I consider that this shoulder has no practical value.

Q. Will a tire with Mellon's shoulder on it wear longer than one attached by shrinkage alone?

(Mr. Fenton objects.)

A. I see no reason why it would. As a matter of fact, I do not know whether it does or not.

Q. Have the tires which have come under your observation, which are attached by shrinkage only, worn as well as those with Mellon's device?

(Mr. Fenton objects.)

148 A. They have. I consider the tires with Mellon's device no safer than those attached by shrinkage alone. I have had instances of both broken and loose tires brought under my observation. I know of no instances in these cases where Mellon's improvement has been of any value. I have known of instances where tires attached by shrinkage alone have become loose and been run home in safety to the shop. I know of one instance where the same thing occurred with a Mellon device.

(Witness shown section of steel tire, marked 217,322.)

That tire was attached by shrinkage alone; it ran 217,322 miles. It came from a Baldwin engine named "Saranac," and numbered 51. It is just in the condition in which it was cut from the wheel. I consider shrinkage alone the best method of attaching a tire. The section above referred to was taken from a driving-wheel.

Cross-examined:

That tire was not broken. We were rebuilding the engine, and the tire would have been too thin by the time we would have got it turned down. In the instances of breakage of tire I have mentioned it was simply a crack across. In the case of No. 25, a shrinkage attachment,

it was the front driving-wheel. We blocked up that wheel. I can name instances of loose tires—one with Mellon's device, one with shrinkage attachment. We have worn out and taken off none of the Mellon tires since we put them on. I have had no practical experience of any account in running an engine.

I know Nos. 3, 59, 60, 61, 62; on all of these the tires are attached by shrinkage alone. No 59 is the "Sampson," 60 the "Hercules," 61 the "Towanda," 62 the "Tioga."

J. I. KINSEY,
M. M. L. V. R. R., South Easton, Pa.

Sworn and subscribed before me this tenth day of March, 1876.
ROBERT N. WILLSON, *Master.*

Mr. Campbell offers in evidence the piece of tire marked 217,322; also, model of wheel and tire, with clamps attached.

149 MARCH 24th, 1876.

Present, Messrs. Fenton, Campbell, and Mellon.

WALTER DAWSON, recalled on behalf of the defendants, says:

I have about one hundred and twenty-five locomotives under my charge on the Delaware, Lackawanna, and Western Railroad. They all have steel tires. The company own in all three hundred and eighteen engines. I could not say positively, but I think we have about thirty engines whose tires are attached by shrinkage only. I am now referring to the one hundred and twenty-five engines. The rest of these have Mr. Mellon's device on the tires. I think we have only one or two with the square shoulder on the outer edge of the inner surface. These, I think, were bought by the company—not built by them. The others have a curved projection upon the wheel-centre and a corresponding recess upon the tire, like Mr. Mellon's model now shown to me. I am familiar with the engines on the Lehigh Valley Railroad. I have not examined the tires on those engines. In practical experience we have not found the tires with Mellon's improvement last any longer than those which are attached by shrinkage only. We make no difference in our management of them. In the event of a tire becoming loose we would not continue to run it, whether it had Mellon's improvement or not.

Q. As an expert, please state whether any profit would be derived to the Lehigh Valley Railroad Company by the use of the projecting flange upon the inside surface of the tire at the outer edge, about one-sixteenth of an inch in depth.

A. I don't see any advantage to be gained, provided it is only a sixteenth of an inch in depth, except in dispensing with the use of the clamps to set the tire in position. If you use three clamps, and have one man to each clamp, I should think it would not take more than ten minutes, and probably less, to attach the clamps. Three clamps are the usual number used.

150 Cross-examined:

I remember the engine "Hamilton Fish" on our road. She has the Mellon tires. I remember her breaking a tire about a year ago. I don't remember when the accident occurred, or where they discovered that the tire was broken. She came to our shop with a broken tire. Our shop is at Scranton. The engine spoken of runs a passenger train between Utica and Binghamton. She does now, and she did at the time her tire was broken. She came to our shop without any help, with the use of her own steam-power. There was no expense to bring her

back to the shop. The break was a crack in one place right through the tire. It opened about a sixteenth of an inch. The tire was on one of the driving-wheels. I remember that we have a switching engine "Pocono." I think that she has the Mellon tires. I don't know that that engine has her right-hand forward driving-wheel tire loose now, and that she has been running so for about a month. She has been in use some five or six years.

I remember the "Thomas Dickson" engine. She has the Mellon tires on. I remember her breaking a tire. She came back to the shop with her own steam. I don't remember how thick the tires of the "Pocono" are now. I remember the engines "Tobyhanna," "Indiana," and "Illinois." I am pretty positive that the first named has the Mellon tires, but I am not positive as to the others. I think the thinnest part of her tire is about an inch. The thickest part is about an inch and a quarter. We shall run her as long as we can—perhaps a month or two—as long as the tires will keep tight on the wheels. She is a freight engine. I have seen the handwriting of Watts Cooke, the former superintendent of our road. I would not like to swear to it.

(Letter handed to witness, dated February 8th, 1868, purporting to be signed by the witness. See page 54.)

That letter was written by my clerk, according to my instructions, undoubtedly, although I have no recollection of it.

The cost of attaching a tire by nipple-bolts is about the same as by set-screws. I do not think that screws or bolts will assist mate-
151 rially in keeping tires on the wheels, except when the tires become thin. I think they help very little to bear the shock of the rail. They offer such a small surface that they are of no material assistance. A continuous flange, like Mr. Mellon's, will offer more surface to help sustain the shock of the wheel on the tire. It is the stretching of the tire, by its pounding on the rail, which tends to loosen it. My testimony is founded upon my experience on our road, and upon the fact that in practice we do not make any difference in the way in which we use the plain tire and the Mellon tire. If a tire was not weakened by the use of bolts or set-screws and became loose the bolts or screws would help to keep it in place on the wheel. I should think that the use of bolts or screws would tend to weaken the tires. I have had no experience in the use of bolts or set-screws with steel tires. I am of the opinion that more tires are fastened by shrinkage only than by bolts or screws. My opinion is based on a report of the Master Mechanics' Association for 1874. I have been an engineer and have run engines.

Q. If a plain tire attached by shrinkage only should become loose from the wheel is there anything to prevent its coming off the wheel if the engine is in motion?

A. If a tire became so loose that its adhesion would not hold it in place, it would come off the wheel on one side as much as the flange on the rail would permit, and on the other as much as the frame of the engine would allow. I do not mean that the tire would come off the wheel, but that its disposition, if it became loose, would be to move sideways. It would have to be very loose to do that. I recollect two instances of large ten-wheel engines, with trucks, where a driving-wheel and tire broke all to pieces, and the engines came safely back. In one instance it was the forward and in the other the rear driving-wheel. It is impossible to tell what would be the result of the breaking of a wheel. In some cases great damage would result; in others but little. The two instances which I just spoke of are exceptional. I don't remember any instance where an accident resulted or any serious loss occurred

from the breaking of a tire in the ordinary use of a locomotive. I don't say that our company has never derived any benefit from the use of Mellon's improvement. I don't know whether it has or not. I
152 don't know whether or not the Lehigh Valley Railroad Company has derived any benefit from its use; but as it has been described to me with the shallow shoulder of a sixteenth of an inch projection, I do not see how there could be any benefit from its use.

Q. If a tire be provided with any device that will keep it longer on the wheel without becoming loose or moving from its place, cannot such a tire be worn longer and thinner than a plain tire shrunk on and without any fastening?

A. Yes; some of our tires have been taken off when the thinnest part of them has been seven-eighths of an inch thick; but I do not remember whether they had Mellon's improvement or not. They were small vessels, on slow-going engines, either freight or switching.

WALTER DAWSON.

Subscribed before me this twenty-fourth day of March, 1876.

ROBERT N. WILLSON, *Master*.

EDWARD H. WILLIAMS, called on behalf of the defendants, is sworn, examined, and says:

I am a member of the firm of Burnham, Parry, Williams & Co., locomotive builders, at the Baldwin Works. I have been a member of the firm since January, 1870. I have been connected with railroads prior to that time as civil engineer and as superintendent. I have been connected with the Michigan Southern, the Galena and Chicago Union, and the Pennsylvania Railroads. I was continuously connected with railroads for twenty-one years. I am theoretically familar with the construction and use of locomotives. I know what Mr. Mellon's improvement is.

Q. Will you state whether, in your opinion, it has any value?

(Mr. Fenton objects.)

A. I think it has no value. I should think it would not be cheaper to attach a tire with Mellon's improvement on it than it would be
153 to attach a tire simply by shrinkage, including the cost of preparing the tire for the wheel. The most ordinary way of attaching tires in our works is by shrinkage alone, without the use of bolts, screws, or other fastenings. I know that is the general practice in other works. We follow the mode of attachment which is prescribed by our patrons. In the absence of instructions we use shrinkage only. The following schedule shows the number of locomotives which we constructed in the several years mentioned, and also the modes of attaching their tires:

	No. of locomotives with chilled tires.	No. of locomotives with steel tires, taper, and set screws.	No. of locomotives with steel tires, nipple bolts.	No. of locomotives with steel tires, shrinkage only.	Total No. of locomotives.
1871	28	1	.....	308	331
1872	18	3	.....	401	422
1873	9	.....	.....	428	437
1874	3	.....	10	149	162
1875	1	.....	.....	129	130
	59	4	10	1,409	1,482

The "chilled tires" were those which were put on without shrinkage, and fastened by bolts or screws in some manner. They are not heated at all to be attached. They are made of cast iron. Steel tires are now in almost universal use for general service on railroads. I consider shrinkage alone the best method of attaching the tires, without disrespect to Mr. Mellon's invention, and as compared to fastening by bolts or screws.

I have known in my railroad experience of tires on locomotives becoming loose and breaking. I was once on an engine when that occurred. I have no recollection of a serious accident ever occurring from such a cause.

Cross-examined:

154 We have never used Mellon's invention. My estimate of its value is based upon theory and my general knowledge of such matters. Previous to 1871 it would be difficult to tell from our books what proportion of locomotives made at our works had their tires fastened by shrinkage alone. In 1870 the large majority of them were fastened in that manner. In 1871 we commenced a new system of keeping our books, which shows these details accurately. I do not know that the Mason Works fasten the majority of tires by set screws or by the use of Mellon's improvement. They turn out about fifty engines a year. I do not know that the Grant Works, Rogers Works, and Danforth, Cook & Co. fasten the greater number of their tires by screws, bolts, or by the use of Mellon's improvement. On the contrary, I see a great many of their engines on which the tires are held in place by shrinkage alone. I do not think it could be told, without a close inspection, whether the tires were held on by shrinkage only or by the use of Mellon's improvement. I have seen tires being put on in each of those establishments by shrinkage alone, without the use of Mellon's improvement. I have seen in various shops through the country engines from each of those shops, I think, where the tire had been removed, and I could see that it had been fastened by shrinkage only. I have never seen a tire removed which had been fastened by Mellon's plan. I might have seen them running without knowing it. I have paid special attention to these matters, because I am a member of the Master Mechanics' Association, and the subject of the use of steel generally for railroad purposes has been much under discussion. I know engine No. 108 of the Pennsylvania Railroad. It was built at the Baldwin Works in 18[illegible]5. The tires are fastened by nipple-bolts. Our works in the past three years have constructed a large number of locomotives for the Pennsylvania Railroad. We built eighty-five ten-wheel engines for that road in 1873. The tires were all fastened by shrinkage only. We are building engines for the same road now, with the tires fastened in the same manner. They are being built on their plan and drawings. The engines on the Reading Railroad, so far as I have seen them—I see a few coming past our works—have their tires fastened by some sort
155 of bolts. My observation and experience have led me to believe that when steel tires were first introduced they were fastened by bolts or crews, in the same manner as iron tires were previously; but that as the uses of steel have become better understood, fastening by shrinkage alone has gradually taken the place of screws or bolts.

I could not say definitely how thin they used to wear tires, when I was actively engaged on railroads. It would depend on the kind of service they were put to. I remember ten or twelve engines which were built by our works for the Lehigh Valley Railroad Company in 1875—

in the latter part of it. There was an error in the gauge used for turning or boring the tire, so that there was no shrinkage, or relatively little, allowed. The tires could have been almost slipped on cold, because a person could move them with a small hammer. We replaced these with other tires attached with the usual shrinkage. If those tires had been fastened by set-screws they would not have remained tight if the engines had been used. I have known tires put on tapering, without shrinkage, and held in place by set-screws. The ten or twelve locomotives spoken of were towed from our shop to the Lehigh Valley Railroad over the rail.

EDWARD H. WILLIAMS.

Sworn and subscribed before me, this twenty-fourth day of March, 1876.

ROBERT N. WILLSON, *Master.*

H. STANLEY GOODWIN, recalled, for the defendants, says:

I am the assistant general superintendent of the Lehigh Valley Railroad Company. I have been so for ten years. Before that I was chief engineer of the Northern Central Railroad. Previous to that I was superintendent of the Catawissa Railroad. My railroad experience extends from 1858. I am familiar with the locomotive-engines on the Lehigh Valley Railroad, and with Mr. Mellon's improvement. I do not know of any instance in which the Lehigh Valley Railroad Com-
156 pany has derived any benefit from that invention. We have tires secured by shrinkage alone, as well as by his improvement. We have had two or three instances of broken tires—not more than three, so far as I can recollect—since I became assistant superintendent. I never knew an instance where serious accident or damage occurred from the breaking of a wheel or tire of an engine. We do not run the tires attached by Mellon's device any longer, nor do we treat them any differently than those attached by shrinkage alone. I do not consider Mellon's tire any safer than a tire attached by shrinkage alone. As soon as a tire becomes loose we send it to be repaired, whether it has his device on or not. My experience has not shown me that a tire attached by Mellon's improvement lasts any longer than one attached by shrinkage alone. We have now discontinued the use of Mellon's plan. We never used it for any other reason than convenience in setting the tire on the wheel. Including the preparation of the tire, it is more expensive to attach a tire by Mellon's plan than by shrinkage alone, because it is more expensive to turn the tire to a particular point and stop than it would be to turn it off plain. This expense might be counterbalanced by the cost of putting on clamps, which answer the same purpose of getting the tire to its true place on the wheel. We now use the clamps instead of the shoulder. Three clamps are generally used. It does not require a skilled mechanic to use them. They are made so as to be screwed on and give the proper gauge for the tire. All that is necessary is that a man should be able to put the clamps in their proper position and bolt them on. I know the ten or twelve engines which we recently bought from the Baldwin Works, as stated just now by Mr. Williams. They were towed up from the works to Packerton over the rails in safety. The tires were replaced or refitted by the makers, and there has been no cause of complaint since.

Cross-examined:

I should say that there are from one to two dozen engines simi-

157 lar to the "Consolidation" on our road. I think that we have not taken off any of the Mellon tires since they were attached. When a tire becomes loose we either line it and shrink it on again, or replace it with another. I have not examined the depth of the shoulder on the Mason engines.

Q. If the Mellon improvement is of no value to your company, then why did you continue to use it from the time when the suit was brought up to 1874?

A. For convenience in setting the tire to its proper place.

H. STANLEY GOODWIN.

Subscribed before me, this twenty fourth day of March, 1876.

ROBERT N. WILLSON, *Master.*

Mr. Campbell offered in evidence bond, as follows:

Know all men by these presents, that we, Edward Mellon and William Matthews, all of the city of Scranton, county of Luzerne, and State of Pennsylvania, are each held and firmly bound unto the Dickson Manufacturing Company, a corporation of the State of Pennsylvani, in the sum of two thousand dollars, lawful money of the United States, to be paid to the said The Dickson Manufacturing Company, or their certain attorney, or successors, to which payment well and truly to be made and done, we bind ourselves, our heirs executors, administrators, and assigns, and every of them, firmly by these presents, sealed with our seals, and dated the ninth day of November, A. D. one thousand eight hundred and seventy.

Whereas, the said Mellon Safety Railway Tire Company claims and demands from the said The Dickson Manufacturing Company the sum of $320, for and on account of use of patent No. 58447, called "Improved method for securing the tire on the wheels of locomotives," used by the said The Dickson Manufacturing Company in manufacturing;

And whereas, the said The Dickson Manufacturing Company
158 has doubts to the legitimacy or validity of said patent and the right of said The Mellon Safety Railway Tire Company to receive said sum, or any other sums of money, for the use thereof; therefore, the condition of this obligation is such that if the said The Dickson Manufacturing Company are not liable in law to pay the said The Mellon Safety Railway Tire Company the sum of three hundred and twenty dollars aforesaid, and such other sums as it may hereafter demand and receive for or on account of the said patent so used by the said The Dickson Manufacturing Company, or if other manufacturing companies or railroad companies using said patent refuse to pay for the same, and the said The Mellon Safety Railway Tire Company does not, within a reasonable time thereafter, commence suit and contest the validity of said patent and its claims thereto to a successful issue against the parties so refusing to pay, then this bond shall remain in force, and all moneys paid the said The Mellon Safety Railway Tire Company shall be refunded, with interest thereon, to the said The Dickson Manufacturing Company.

In testimony whereof, we have hereunto set our hands and seals, the ninth day of November, A. D. one thousand eight hundred and seventy.

EDWARD MELLON. [SEAL.]
WILLIAM MATTHEWS. [SEAL.]

Signed and sealed in the presence of—
(Signed) WILLIAM H. PERKINS.

Received, Scranton, January 7th, 1871, from the Dickson Manufacturing Company, three hundred and twenty dollars in full for use of patent for securing tire, as per bill rendered October 8th, 1870.

$320.

(Signed) WILLIAM MATTHEWS,
Treasurer.

159 Received, Scranton, April 29th, 1871, from the Dickson Manufacturing Company, three hundred and twenty in full for use of patent for securing tire, as per bill rendered January 27th, 1871.

$320.

(Signed) WILLIAM MATTHEWS,
Treasurer.

Received, Scranton, November 20th, 1871, from the Dickson Manufacturing Company, four hundred and twenty dollars in full for use of patent for securing tires, as per bill rendered September 26th, 1871.

$420.

(Signed) WILLIAM MATTHEWS,
Treasurer.

Received, Scranton, August 27th, 1872, from the Dickson Manufacturing Company, three hundred and forty dollars in full for use of patent for securing tires, as per bill rendered in May, 1872.

$340.

(Signed) WILLIAM MATTHEWS,
Treasurer.

Received, Scranton, May 10th, 1873, from the Dickson Manufacturing Company, four hundred and ninety dollars in full for use of patents for securing tires, as per bill of October 14th, 1872.

$490.

(Signed) WILLIAM MATTHEWS,
Treasurer.

160 *Plaintiff's rebuttal.*

MARCH 10TH, 1876.

Mr. Fenton offers plan marked Exhibit Parry; also photograph of engine "Consolidation," marked Exhibit Parry, No. 2.

MARCH 24TH, 1876.

Mr. Fenton offers in evidence the letter signed "Walter Dawson," marked Exhibit Mellon, March 24th, 1876, (see ante, page 44), as follows:

THE DELAWARE, LACKAWANNA AND WESTERN R. R. CO.,
OFFICE OF THE MACHINE SHOPS,
Scranton, Penn., Feb. 8th, 1868.

EDWARD MELLON, Esq.:

D'R SIR: In reply to your inquiries concerning the manner in which your patent tire fastener works in case of tire breaking, would say: Engine "Pequest" broke two tires January 23d, 1868, and run, after breaking, about 20 miles, coming to the shop without difficulty and with both tires in place on wheels.

The tires were secured in no way but by your patent method.

Yours, truly,

WALTER DAWSON, *M. M.*

161 EDWARD MELLON, recalled on behalf of the plaintiff, says:

In the Mason engines, in Exhibit E, the shoulder is in some cases over three-eighths of an inch, and in some cases a little less than threee-ighths of an inch in depth. I have examined the engines "Tobyhanna," "Illinois," "Pocono," and "Indiana" of the Delaware, Lackawanna and Western Railroad Company. I examined the tires on the wheels. The engines are still running. The "Pocono" and "Tobyhanna" have my improvement on, I know, and I believe the others have too, but I would not be sure; they are steel tires. The "Tobyhanna" has the same tires on which I put on her in 1865. She was destroyed in an explosion once, but the same wheels and tires were put on a new engine with the same name. She was out of use for several years. The thinnest part of the "Tobyhanna's" tires is seven-eighths of an inch; it is the thinnest part of the thinnest tire. The thinnest part of the "Pocono's" tires is about three-quarters of an inch. It is not the general practice in the Rogers Works to attach tires by shrinkage alone. I don't think they ever built one except they secured the tires by some device other than shrinkage. Danforth, Cook & Co. attach more tires by shrinkage only than any other works I know of in Paterson. I have seen a great many engines built by them which had my improvement.

Cross-examined:

I could not give the names of the Mason engines which have a flange over three-eighths of an inch in depth. Those built since 1868 have this flange. Those built longest ago had a small flange; I don't know how deep they were. Their new engines all had a deep flange.

EDWARD MELLON.

Subscribed before me this twenty-fourth day of March, 1876.

ROBERT N. WILLSON,
Master.

162 APRIL 17TH, 1876.

Present, Messrs. Fenton, Campbell, Mellon and Matthews.

Since the previous meeting the master has received from Mr. Walter Dawson, a witness heretofore examined, two sections of tires, which are referred to in the letter of Mr. Dawson which is appended, marked Exhibit Dawson, April 17th, 1876.

It is agreed between the counsel present that the said sections of tires and the said letter of Mr. Dawson shall be considered as a part of the proofs in the cause.

EDWARD MELLON, recalled on behalf of the plaintiffs, says:

I have in my hands the two tires sent by Mr. Dawson to the master. The plain tire from engine No. 98 was taken from engine "Continental," on the Delaware, Lackawanna and Western Railroad. The piece of my tire was taken from engine No. 34, the "Pocono," of the same railroad. The last is full three-quarters of an inch in thickness. The plain tire just spoken of is fifteen-sixteenths of an inch thick.

The tire of the "Pocono" was not worn out when this section was taken off from it. All of the tires on her were tight but this one, and this was not loose, but had linings in between the tire and the wheel, part of the way round. The engine could have run longer with those tires. She was used as a freight engine. I could not say how much thinner the tire could be worn; but if the engine was mine I think I would run her a year longer.

(Witness is shown a piece of zinc.)

This is a cross-section of a tire, like that on the "Pocono" when new. It is called a templet. I knew the engine when she was new, and knew the size of her tires. The engine "Continental" was a switching and freight engine. The tire on her was crowded in on the wheel, that is, moved from its seat on the wheel toward the frame of the engine, so much that the tire could not be run any longer. This
163 accounts for the peculiar shape of the rail-flange. The tire was not worn out. It needed to be secured from being crowded off its place on the wheel. It could then have been run for two years. I mean that it needed to be secured by my device, or by some other device that would secure it without injury to the tire. The tire had become unserviceable on that engine. It was already lined up all around the wheel. This tire was taken off because the engine could not be run any longer with it.

Cross-examined:

The engine "Continental" was in use until about a couple of days before the tire was taken off, which was the day after the "Pocono's" tire was removed.

EDWARD MELLON.

Subscribed before me this 17th day of April, 1876.

ROBERT N. WILLSON, *Master.*

Mr. Fenton offers the "templet," before referred to, in evidence. It is marked Exhibit Mellon, April 17, 1876."

Exhibit Dawson.—April 17, 1876.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
OFFICE OF THE MACHINE SHOPS,
Scranton, Pa., 8th April, 1876.

ROBERT N. WILLSON, Esq.,
216 *South Fourth Street, Phila'a,*

SIR: I send you by express to-day pieces of the tires of engines Nos. 34 and 98.

No. 34 had Mellon's fastenings on, as is shown by the recess near the flange; the other had not; you will find the numbers and other information stamped on each.

No. 34 was new September, 1869, and taken from the engine April 4th, 1876, during which time it had run 161,140 miles. No. 98 was new February, 1867, and taken from engine April 4th, 1876, during which time it had run 242,015 miles. You will observe that the one
164 without the fastening ran the greater number of miles. The pieces are of the same size, yet the one with the fastening is four ounces heavier; it is worn more at the centre, but for all that it is thicker at the flange and at the outer edge. The inside diameter of both tires was forty-one inches.

Yours, respectfully,

WALTER DAWSON,
Master Mechanic.

MAY 30TH, 1876.

Present, Messrs. Fenton and Campbell.

Mr. Campbell offers in evidence a statement showing the depth of shoulders on tires mentioned in Exhibit E, which statement is marked Exhibit L. V. R. R., May 30th, 1876.

Mr. Fenton admits that if Mr. Kinsey was produced he would testify that the contents of the statement just referred to are accurate, and that the same may be taken as a part of his testimony, but objects to the relevancy thereof.

It is admitted that engine No. 53 has not the plaintiff's improvement.

Exhibit L. V. R. R.—May 30th, 1876.

Depth of shoulder on tires mentioned in Exhibit E.

No. of engine.	Depth of shoulder.	No. of engine.	Depth of shoulder.
53	No. shoulder.	162	1⅛ inch.
125	⅛ inch.	163	1⅛ "
126	⅛ "	177	1⅛ "
149	⅛ "	178	1⅛ "
150	⅛ "	191	1⅛ "
151	⅛ "	192	1⅛ "
152	⅛ "	193	1⅛ "
153	⅛ "	194	1⅛ "
154	⅛ "	195	1⅛ "
155	⅛ "	196	1⅛ "
156	⅛ "	197	1⅛ "
157	⅛ "	198	1⅛ "
158	⅛ "	199	1⅛ "

165 To the honorable the judges of the circuit court of the United States for the eastern district of Pennsylvania, in the third district court:

The foregoing report of the master in this case having come before your honors, and the matter referred to therein having been recommitted to him for the hearing of further proofs, he now reports that at various meetings held for the purpose, the counsel for the respective parties submitted such proofs to him, particularly with reference to the gains or profits which the defendants have realized by their infringement of the plaintiff's patent. These proofs will be returned to the court herewith.

In endeavoring to ascertain what such profits or gains have been, the master, in pursuance of the principles laid down in Mowry vs. Whitney, 14 Wall., 620, must search for the savings or profits which the defendants have made by the use of the plaintiff's invention, over and above what they would have made by the use of any other device that was open to them and equally beneficial, or as nearly so as possible, towards the purpose in view, with that which they improperly employed.

It is claimed, on behalf of the plaintiff, that the only feasible method of fastening tires to locomotive wheels, other than that covered by his patent, is by set screws or bolts. The defendants, however, insist that the comparison must be made with a plan which they have wholly relied upon for the engines which they have placed upon their road since 1874. This plan is simply to heat a tire (which is made of a slightly smaller inside diameter than the outside diameter of the wheel center) until it has expanded sufficiently to be put upon the wheel, and having put it there, to allow it to contract until it tightly grasps or encloses the wheel. This the witnesses speak of as plain or simple shrinkage.

166 The master is of the opinion that the comparison spoken of must be made between Mellon's contrivance and fastening by shrinkage only. If the defendants have selected an inferior mode for the competition, the plaintiff cannot be injured by their choice. The proofs, however, seems to the master to leave no ground for reasonable doubt—however much theory may be disappointed by the result—that a tire fastened by

shrinkage alone is as valuable, for practical railroad purposes, as when secured by screws, bolts, or rivets, and that, since the introduction of steel tires, the former method has come into general usage. The plaintiff's witnesses themselves, with the exception of Mr. Moore, had no personal knowledge of any other means of securing the tires than Mellon's and plain shrinkage, both of which methods are in use upon the railroads with which these witnesses were connected. Mr. Moore strongly condemned the attachment of tires by simple shrinkage, but his testimony upon this point lacked the element of experience, for he stated that such plan had come into use since he was connected with railroads, and that he had no personal knowledge of it. The master is of the opinion that the most natural and reasonable inference to be drawn even from the testimony of the witnesses called by the plaintiff is opposed to the view urged on his behalf, as to the relative value of plain shrinkage. Aside from the general impression produced by their testimony, he cannot otherwise construe their statements, when they say that steel tires are usually attached, so far as known, by shrinkage only (Dawson, Comp't's Proofs, p. 2), that other modes of fastening the tires than by Mellon's plan and by plain shrinkage had been abandoned (Conwell, Comp't's Proofs, 6); and that set screws are going out of use (Dotterer, Comp't's Proofs, 14). The defendants' proofs, however, are emphatic enough upon this point to remove any possible doubt, and the master cannot reach any other conclusion about it than that which he has expressed.

Making, then, the comparison between tires fastened by means of the plaintiff's invention and by simple shrinkage, wherein does the gain or saving consist?

167 The plaintiff claims that the proofs show that a tire fastened by his plan can be worn thinner than one fastened in the other method, by at least three-eighths of an inch. If this be so, it will not be difficult, by taking into consideration the thickness of the tires, their weight, and the average cost of steel, which is the metal from which the tires used by the defendants were made, to arrive with reasonable certainty at the amount of the savings or gains for which the defendants are liable in this proceeding.

The claim of the plaintiff upon this point is not conceded by his adversary. On the contrary, the defendants contend that while the plaintiff's invention adds to the convenience of placing the tire upon the wheel, with a somewhat greater outlay of money, it secures no other practical benefit in the use of the tires.

The master finds it difficult to arrive at any satisfactory solution of this controversy. The proofs consist almost entirely of the opinions of witnesses as to what results will be, and not as to what they have been, and this necessarily for the reason that the time which has elapsed since the invention was introduced into use has not been sufficient to permit tires fastened by either of the methods brought into comparison to be worn to such an extent as that any one can certainly know from experience which mode is the more profitable. A few isolated instances of tires secured by Mellon's plan, and by simple shrinkage, being used after they had been worn to an exceptional degree, have been referred to by some of the witnesses, but by no means enough of them to form a safe basis for judgment. Such differences as these few instances show might readily be accounted for by the different conditions to which the tires had been subjected. The serviceable duration of any particular tire depends materially upon its diameter, the weight of the engine, the velocity of its motion, and the character of the road-bed and track.

168 It is obviously impossible to know what all these items have been at all times in the life of any tire, and therefore it would be unsafe to arrive at any definite conclusion simply upon results as shown in a few tires.

So far as fractures arising from frost and hard usage are concerned, there does not seem to be any superiority in either method of securing the tires. Nor is it pretended that either mode of fastening will prevent a tire from becoming loose upon the wheel. It is claimed, and apparently with good reason in theory, that the locking of the tire to the wheel centre by the fitting of the shoulder of the tire or wheel into the recess in the one or the other, according to circumstances—which is effected by the use of the plaintiff's device—tends, by the resistance which it affords to the lateral strain of the locomotive, to keep the tire and the wheel centre in firm and close contact longer than if they had been held together by shrinkage alone. Indeed, this seems to be the only merit which has any substantial value, or that is capable of even approximate determination. For while it is claimed that the Mellon tire makes locomotion safer, and obviates to a certain extent the expense of repairs, the plaintiff admits that these elements are not capable of measurement or determination. And so far as the tendency of the pounding of the wheel upon the rail to stretch the tire is concerned, the master is unable, from anything in the case, to see why it is not equally great, whatever mode of fastening is used. Now, if the advantage of the plaintiff's device consists merely in the opposition which it affords to the lateral thrust of the engine, it would appear to be obvious that, while this opposition might be sufficient to overcome the tendency to separate the tire from the wheel, which would act most powerfully as the tire was approximating its minimum safe degree of thickness, this would not prevent the tire fastened by Mellon's plan from becoming loose when the tire had become so stretched that its inside diameter exceeded the outside diameter of the wheel. How much difference there would be in the thickness of two tires, one being held by Mellon's plan, and the other by simple shrinkage, but otherwise alike in construction, size, and usage,
169 at the point of their becoming loose, the proofs do not show. In fact, it is not altogether clear that there is any practical difference in this regard. Mr. Mellon, in the description which he gave of his invention (as it appears in connection with his letters patent), apparently relied more upon the ease and cheapness of attachment than upon any increased durability. If, at that time, he had regarded his device as possessed of the great merit of prolonging the life of a tire, it seems strange that he did not mention it, especially as he referred to the fact that a tire will become loose. With reference to that feature in the use of a tire, he only claimed, that should the tire become loose on the road, there would be safety in running the engine to a depot or place for repairs. In this connection it may be noted that, notwithstanding the witnesses called on behalf of the plaintiff state that, in their opinion, the Mellon tire can be worn thinner than a tire fastened by plain shrinkage, they also say, in substance, that, in the actual use of tires fastened by the two methods, they make no difference in favor of either; that they cannot tell how much thinner the Mellon tires can be worn, or whether they are as likely to get loose; that when the Mellon tires are worn down to seven-eighths of an inch, for instance, they are not fit to be used by the "average engineer," and that, if either tire should be broken or loose, it would only be safe to run the engine to a shop or switch. In point of fact, the use of locomotive engines does not indicate that much loss has accrued from broken or loose tires, in ordinary

cases, or that there is any serious difficulty in getting an engine, whose tires are secured by plain shrinkage, home to a shop or a place of safety.

On the other hand, the defendant's witnesses (some of whom are in the employ of the company, in positions of responsibility) express the opinion, in some cases founded upon personal knowledge of the Mellon tire and in others merely upon theory, that there is no practical advantage in the use of that tire or mode of fastening over plain shrinkage.

These witnesses are quite as numerous as those called on behalf
170 of the plaintiff, and, for aught which the master can perceive, they are equally honest and trustworthy. As has been stated, all of the witnesses are compelled to testify upon mere opinion as experts, in anticipation of the definite result of experience. It may be that it is an infirmity of the plaintiff's case that, owing to the peculiar subject matter of the invention, so much time is required to reach a demonstration of its merits by comparison of actual experiences. In this position of things, it is impossible for the master to bring his mind to rest upon any conclusion with reasonable assurance that he will thereby do justice to either party. It does seem to him, however, that the mechanical features of the invention in question are of such a character as to induce an a priori judgment in favor of the greater durability of a tire fastened by means of it, for the reason before referred to, that a resistance is offered to the lateral force of the engine which does not exist where the tire is secured by shrinkage alone.

Besides this, the defendants are in the position of trespassers upon the plaintiff's rights, and of having applied his invention against his protest and in defiance of his suit, until they were stopped by the process of the court. Even a doubt in such a case ought, in the opinion of the master, to be resolved against an infringer. It will, therefore, be treated by him as established that the use of the Mellon invention adds to the life of a tire, as compared with the use of shrinkage only.

The next inquiry then will be, how much is saved or gained in this manner?

Mr. Mellon testifies that a tire properly secured by his plan could be used safely until it was worn down to from seven-eighths to three-quarters of an inch in thickness. He also says, that a tire fastened by plain shrinkage could be worn to an inch and a quarter in thickness if it did not break or become loose. Though the master has no question of the integrity of Mr. Mellon in the giving of his testimony, he does not think that these judgments of the witness and party should be taken as accu-
rate. As reasons for this opinion, reference may be made to the
171 fact that the witness has had, so far as appears, but two or three instances, at the most, before his observation, in which his tire has been worn to the extent stated by him, and further, that he has had no experience in the use of tires fastened by plain shrinkage. Indeed, the weight of his opinion and the fairness of his judgment would appear to suffer somewhat, when it is considered that he was really unwilling to concede that a tire held by simple shrinkage was of any practical value, notwithstanding it is clearly the fact that that method is in general use throughout the country.

It may have some force, also, in this connection, that two sections of tires were produced before the master, one of which had been fastened by plain shrinkage and the other by Mellon's plan. The former had run 242,015 miles, and was worn down to fifteen-sixteenths of an inch in thickness; the other had run 161,140 miles, and was worn to three-quarters of an inch. Both tires were of the same diameter, and belonged to freight and switching engines. It will be observed, that though the

Mellon tire was worn the thinner, by three-sixteenths of an inch, the other had a third greater mileage, and was worn five-sixteenths of an inch thinner than Mr. Mellon's estimate of the endurance of such a tire.

Looking, then, elsewhere than to Mr. Mellon for information by which a fair comparison can be made, and remembering that, in a department of business where such serious interests of life and property are at stake as in the conduct of railroads, the extreme possibility of endurance ought not to be taken as the practical measure of capacity, the master finds no other standard by which he can estimate the amount of the defendants' savings or gains than that which is afforded by the testimony of Mr. Conwell.

The witness is not altogether clear or consistent in his statements, but it may be inferred, from what he says, that the Mellon tires can be safely used until they are an inch in thickness, and that tires fastened by simple shrinkage may, with as much safety, be worn to a thickness of an inch and an eighth. Mr. Graham, one of the defendants' wit-
172 nesses, also stated that on his railroad tires secured by the latter plan were run until they were worn to a thickness of less than an inch and an eighth.

The master, therefore, concludes that there is a saving or gain to the defendants, from the use of the plaintiff's invention, of an eighth of an inch in the thickness of the tires. This he regards as a liberal construction of the proofs in favor of the plaintiff, particularly in view of the fact that a large portion of the tires used by the defendants have the projecting shoulder so slightly elevated that they do not derive the full benefit of the plaintiff's invention, as it is usually applied.

The proofs show that the defendants have used two hundred and fifty-three tires less than two and three-quarter inches in thickness, and two hundred and forty-nine of a greater thickness. In his computation, the master will treat these tires as of two and a half and three inches in thickness respectively. If, then, there is a saving of one-eighth of an inch in the thickness of the tire, it follows that one-twentieth of the lesser, and one twenty-fourth of the larger, tires are gained or saved by the use of the plaintiff's invention. The proofs warrant the conclusion that a steel tire two and a half inches thick will have an average weight of eight hundred and fifty pounds, and a tire three inches thick will have a like weight of one thousand pounds.

The average cost of steel tires per pound during the time under investigation was fifteen cents. A simple mathematical calculation, based upon the data before stated, will show that the defendants have saved or gained as much as six dollars per tire by the use of the plaintiff's device, and the master will make his further computation upon this basis.

It follows, therefore, that the entire amount saved or gained by the defendants in this manner is three thousand and eighteen dollars.

It appears, however, that Mr. Mellon made an assignment of an equal undivided half interest in his patent, on the seventeenth day of November, 1869, to William Matthews. The counsel before the master have agreed in writing that the decree made in the cause shall be
173 amended so as to make Mr. Matthews a co plaintiff with Mr. Mellon in this action. They also agree that the master shall apportion the total amount of the defendants' savings or gains, as before stated, between Mr. Mellon solely, and Mr. Mellon and Mr. Matthews jointly, as of the date of the said assignment.

The proofs show that the defendants made use of the plaintiff's in-

vention in setting one hundred and fifty-eight tires previous to the said date, and three hundred and forty-five tires subsequently.

The master finds, therefore, that the defendants shall pay to Edward Mellon the sum of nine hundred and forty-eight dollars, and to Edward Mellon and William Matthews the sum of two thousand and seventy dollars, as the gains or savings which they, the said defendants, have realized from the infringement of the said plaintiff's exclusive rights, to which the said decree of your honorable court refers.

All of which is respectfully submitted.

ROBERT N. WILLSON,
Master.

OCTOBER 17TH, 1876.

174 The following exceptions to the foregoing report of the master have been filed with him by the counsel of the respective parties to the action. They have been considered by him, but he finds in them no reason for changing the conclusions previously expressed.

Respectfully submitted.

ROBERT N. WILLSON, *Master.*

NOVEMBER 13, 1876.

Exceptions on behalf of complainants to the report of Robert N. Willson, esq., master.

In the circuit court of the United States. In equity. April sess., 1868.
No. 2.

MELLON ET AL.
vs.
LEHIGH VALLEY R. R.

The learned master erred—

1. In not computing and assessing the gains and profits of the defendants, payable by them under the decree, upon the basis of a comparison of the patented improvements with tires secured to the wheels by means of bolts or screws; under which mode of assessing defendants' gains the plaintiffs would be entitled to an award of seven thousand and forty-two dollars ($7,042), there being an undisputed saving of at least fourteen dollars per wheel, in first cost of construction, in favor of plaintiff's method, over tires secured by bolts or screws.

2. In that, admitting that the master was right in estimating defendants' gains and profits, upon the principles adopted by him, the
175 testimony fully warranted the conclusion that the plaintiff's tires could be worn fully three-eighths of an inch thinner than plain tires attached to wheels by shrinkage only; upon which basis of calculating defendants' savings or gains the plaintiffs were entitled to an award of eighteen dollars per wheel, or nine thousand and fifty-four dollars.

3. In that, conceding that the principles adopted by the master in his report are correct, and not excepting to his conclusions in any respect, except as to the extent of the defendants' savings by reason of the additional durability of plaintiffs' tire, his finding in that respect was clearly erroneous, for that the testimony produced by the plaintiff, and not contradicted by the defendants, established the fact that the plaintiffs' tire could be worn safely to a point thinner or at least as thin as $\frac{1}{8}$ to $\frac{1}{4}$ of an inch; and that plain shrinkage tires would not longer remain

tight on the wheel when worn down to 1¼, or at the lowest 1⅛ inches in thickness, and were no longer of any use after reaching that degree of thinness; showing a clear saving of ½ to ⅝ of an inch ordinarily, and never less than ¼ of an inch; so that upon a construction of the testimony extremely liberal to the defendants, the plaintiffs were entitled to the benefit of a saving of at least ¼ inch, or $12 worth of metal, which, for the 503 tires used by defendants, would amount to six thousand and thirty-six dollars, of which Edward Mellon should receive $1,896.00, and the plaintiffs jointly the sum of $4,140.00; and the master should have so reported.

FURMAN SHEPPARD,
HECTOR T. FENTON,
Solicitors for Complainants.

OCTOBER 19TH, 1876.

176 *Defendants' exceptions to master's report.*

C. C. U. S. E. D. of Penn'a, of April sess., 1868, No. 2. In equity.

MELLON
vs.
THE LEHIGH VALLEY RAILROAD COMPANY.

The defendants, by Alex. D. Campbell, their attorney, except to the report of the master in the above-entitled cause:

I. Because the master reports that "it may be inferred from what he (the witness Conwell) says, that the Mellon tires can be safely used until they are an inch in thickness, and that tires fastened by simple shrinkage may, with as much safety, be worn to a thickness of an inch and an eighth."

II. To the master's conclusion that there is a saving or gain to the defendants, from the use of the plaintiff's invention, of an eighth of an inch in the thickness of the tires.

III. Because the master reports that, "if * * there is a saving of one-eighth of an inch in the thickness of the tire, it follows that one-twentieth of the lesser (two and one-half inches thick), and one-twenty-fourth of the larger (three-inch) tires, are gained or saved by the use of the plaintiff's invention."

IV. Because the master reports that the defendants have saved or gained the sum of three thousand and eighteen dollars (3,018) by the use of the plaintiff's invention.

V. Because the master erred in reporting that any gain or saving had accrued to the defendants by the use of the plaintiff's invention.

ALEX. D. CAMPBELL,
Attorney for Defendants.

177 And afterwards, to wit, on the 14th day of December, A. D. 1876, the plaintiff by his attorney, and leave of the court first had and obtained, comes into our said court here and files an amendment of bill and decree thereon; which said amendment, being filed, is in the words following, to wit:

In the circuit court of the United States in and for the eastern district of Pennsylvania. In equity. April sess., 1868. No. 2.

EDWARD MELLON
vs.
LEHIGH VALLEY R. R. Co.

The petition of Edward Mellon and William Matthews re-
178 spectfully represents:

That your petitioner Edward Mellon, on the 11th day of April, 1868, filed his bill of complaint against the defendants above named, setting forth such several matters and things as are therein for that purpose more particularly mentioned; and that since the exhibiting of his said bill in the said court he, the said Edward Mellon, plaintiff therein, by an assignment in writing dated the 17th day of November, 1869, duly recorded in the Patent Office of the United States in liber A[12], page 423, granted, assigned, and conveyed unto your petitioner, William Matthews, an equal undivided half part of the whole right, title, and interest in and to the invention and letters patent mentioned in
179 the said bill of complaint, which, or an exemplified copy of which said assignment, your petitioners now bring here into court.

Your petitioners therefore pray that your honors may order and direct that the said William Matthews be made a party to the said suit, and that the name of your petitioner, William Matthews, may be added as a party plaintiff with the said Edward Mellon on the record of said proceedings. And further, your petitioners pray that the decree entered by your honorable court on the 7th day of October, 1874, in the said cause, may be amended by adding the name of said William Matthews as a party plaintiff for the reasons aforesaid.

EDWARD MELLON.
WM. MATTHEWS.

180 EASTERN DIST. OF PENN'A,
City of Philadelphia, ss:

Edward Mellon, being duly sworn, says the facts set forth in the foregoing petition are correct and true.

EDWARD MELLON.

Sworn and subscribed before me this 24th day of March, 1876.
[SEAL.] EDW. H. WILLIAMSON,
Notary Public.

And now, March 24th, 1876, it is agreed between counsel for pl'ff and def't respectively that the foregoing petition may be filed with like effect as though a supplemental bill had been filed and leave of court obtained, and an exemplified copy of said assignment may be filed
181 therewith in proof of the facts therein stated, and the same may be considered as filed nunc pro tunc as of a day immediately prior to the entry of the decree of October 7th, 1874, and the said decree may be and is hereby amended as prayed for in said petition; and further, that this agreement may be entered on the minutes with like effect as though said petition had been duly allowed by the court and decree formally entered.

H. T. FENTON,
For Pl'ffs.
A. D. CAMPBELL,
For Def'ts.

182 Whereas Edward Mellon, of Scranton, in the county of Luzerne and State of Pennsylvania, did obtain letters patent for certain new useful method of attaching tires upon the wheels of locomotives, which letters patent bear date the second day of October, 1866, and are numbered 58447; and

Whereas William Matthews, of the city of Scranton, Luzerne County, Pennsylvania, is desirous of acquiring an interest therein:

Now, this indenture witnesseth that for and in consideration of the sum of ten thousand dollars, lawful money of the United States, to me

in hand paid, the receipt of which is hereby acknowledged, I
183 have assigned, sold, and set over to the said William Matthews, his heirs and assigns, the one-half part of all the right, title, and interest which I have in the said invention, as secured to me by said letters patent, the same to be held and enjoyed by the said William Matthews, his heirs and assigns, jointly with me, for his own use and behoof and the use and behoof of his legal representatives, to the full end of the term for which said letters patent are to me granted, as fully and entirely as the same would have been held and enjoyed by me had this sale and assignment not been made.

In testimony whereof I set my hand and affixed my seal this 17th day of November, A. D. 1869.

184 (Signed) EDWARD MELLON.

Sealed and delivered in the presence of—
E. N. WILLARD.
A. RUTHVEN.

[E. M., Nov. 17.]

U. S. PATENT OFFICE.

Rec'd for record Nov. 22, 1869, and recorded in liber A^{12}, page 423 of Transfers of Patents.

In testimony whereof I have caused the seal of the Patent Office to be hereunto affixed.

(Signed) SAM'L J. FISHER,
Commissioner of Patents.

185 (Endorsed:) No. 2. April sess., 1868. U. S. C. C. Eq. Mellon vs. Lehigh V. R. R. Co. Amendment of bill and decree.

And now, Dec. 12, 1876, on motion of H. T. Fenton, of counsel with compl'ts, it is ordered that within amendment be entered on the record nunc pro tunc as October 7, 1874.

WM. M'KENNAN,
Cir. Judge.

Filed and entered December 14, 1876. F. Sheppard, H. F. Fenton, for compl'ts.

186 And afterwards, to wit, on the 22nd day of October, A. D. 1877, the final decree of the court was entered, which said decree, being filed, is in the words following, to wit:

In the circuit court of the United States, eastern district of Pennsylvania. In eq. April sess., 1868. No. 2.

EDWARD MELLON ET AL.
vs.
THE LEHIGH VALLEY R. R. CO.

And now, to wit, October 22, 1877, this cause having come on to be finally heard at the October session, 1876, of this court, on exceptions filed by complainants and respondents respectively to the report
187 of the master to whom the cause was referred by decree of Oct'r 7th, 1874, and the matter of said exceptions having been fully argued by counsel for the parties respectively, and the same

having been duly considered by the court, it is now ordered, adjudged, and decreed that the exceptions on both sides be dismissed and the master's report confirmed absolutely.

And it is further ordered that the defendants pay the amount found due and owing to the plaintiffs by the said report, to wit, the gross sum of three thousand and eighteen dollars, of which Edward Mellon shall receive the sum of nine hundred and forty-eight dollars, and the plaintiffs jointly the sum of two thousand and seventy dollars together, also, with the costs of suit, to be taxed by the clerk.

188 And it is further ordered that a writ of perpetual injunction issue in this said suit against the said defendants The Lehigh Valley Railroad Company, enjoining and restraining them, the said corporation defendant, and its officers, employees, agents, and workmen, and each and every of them, from making, constructing, using, and applying, or vending to others to be used and applied, and improved locomotive-wheel tires, made, constructed, used, and applied in the manner and for the purpose described in the specifications attached to the letters patent mentioned in the bill.

By the court.

Whereupon the defendants, by Alexander D. Campbell, their attorney, in open court pray an appeal, and the same is allowed.

189 (Endorsed:) U. S. C. C. 2 April sess., 1868. Mellon et al. vs. Lehigh Valley R. R. Final decree. Entered October 22, 1877.

190 And afterwards, to wit, on the thirtieth day of October, A. D. 1877, the defendants file their bond on appeal, which is in the words following, to wit:

Of April session, 1868. No. 2. In equity.

EDWARD MELLON AND WILLIAM MATTHEWS
vs.
THE LEHIGH VALLEY RAILROAD COMPANY and Asa Packer, president thereof.

Know all men by these presents that we, The Lehigh Valley Railroad Company and Asa Packer, president thereof, and the said Asa Packer and George B. Markle, of the city of Philadelphia, are held and

191 firmly bound unto the above named Edward Mellon and William Matthews in the sum of seven thousand dollars ($7,000), to be paid to the said Edward Mellon and William Matthews, their executors, administrators, or assigns; to which payment, well and truly to be made, we do hereby bind ourselves, and each of us, our and each of our respective successors, heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, dated this twenty-seventh day of October, 1877.

Whereas the above named defendants have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above suit by the circuit court for the eastern district of Pennsylvania:

192 Now, the condition of this obligation is such, that if the above named defendants shall prosecute their appeal with effect, and answer all damages and costs if they shall fail to make their appeal

good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

[SEAL.] ASA PACKER,
President.

Attest:
JNO. R. FANSHAWE, *Sec'y.*

ASA PACKER. [SEAL.]
G. B. MARKLE. [SEAL.]

The above bond and sureties are approved October 30, 1877.
By order of court.

SAMUEL BELL,
Clerk, &c.

193 CITY & COUNTY OF PHILADELPHIA, *ss:*

Asa Packer, being duly sworn, says that he is worth the sum of fifty thousand dollars ($50,000) after the payment of all his debts.

ASA PACKER.

Sworn to and subscribed before me this 30th day of October, 1877.
[SEAL.] W. C. ALDERSON,
Notary Public.

194 (Endorsed:) 2 Ap'l sess., 1868. Equity. C. C. U. S. Mellon vs. L. V. R. R. Co. Bond on appeal. Filed October 30, 1877.

195 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of Mellon vs. The Lehigh Valley Railroad Company et al., No. 2, April session, 1868, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name
196 and affixed the seal of the said court at Philadelphia this sixth day of July, A. D. 1868, and of the Independence of these United States the 103rd.

[SEAL.] SAMUEL P. BELL,
Clerk C. C. U. S.

(Indorsement on cover:) No. 451. The Lehigh Valley Railroad Company & al., appellants, vs. Edward Mellon & William Matthews. E. Pennsylvania, C. C. U. S. Filed 7th August, 1878.

17-112

In the Supreme Court of the United States

No. ~~177~~ 21

THE LEHIGH VALLEY RAILROAD CO.

vs.

MELLON.

Certiorari and Return.

The United States of America, ss.

The President of the United States of America to the Judges of the Circuit Court of the United States for the Eastern District of Pennsylvania, GREETING:

Seal of the Supreme Court of the U. S.

WHEREAS in a certain suit in said Circuit Court, between Edward Mellon and William Matthews, complainants, and The Lehigh Valley Railroad Company and Asa Packer, President of said Company, defendants, which suit was removed to the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested.

You therefore are hereby commanded that, searching the copy of the printed transcript of the record annexed hereto, you certify what omissions and errors you shall find to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

WITNESS the Honorable Morrison R. Waite, Chief Justice of said Supreme Court, the twenty-second day of December, A. D. 1880.

(Signed) JAMES H. McKENNEY,
Clerk Supreme Court U. S.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

In obedience to the writ of certiorari hereunto annexed, I hereby certify that, having searched the printed transcript of the record annexed hereto, I find certain omissions and errors as follows, viz.:—

On page 8, line 5, the word "long" should be omitted.

On page 8, line 3 from the bottom, the word "inner" should be inserted between the words "the" and "edge."

On page 12, line 11 from the bottom, the word "use" should be "see."

On page 13, line 5 from the bottom, the word "ties" should be "tires."

On page 14, line 30, the word "knew" should be "know."

On page 25, line 32, a capital "E." should be inserted before the words "A. Packer."

On page 25, line 4 from the bottom, the word "pass" should be "paper."

On page 29, line 4 from the bottom, the word "the" should be stricken out after "Boutcher," and "& Co." inserted.

On page 31, line 21, the first word should be "ready" instead of "really."

Same error on line 23.

On page 33, line 2, the word "curbed" should be "curved;" and on line 34, the word "between" should be inserted before "July."

On page 79, line 15, the word "vessels" should be "wheels."

I annex hereto an agreement of counsel, with the documents therein referred to, which supplies other omissions and errors.

In witness whereof, I have hereunto subscribed my name, and affixed the seal of this court, this thirty-first day of December, A. D. 1880, and in the year of the Independence of the said United States the 105th.

SAMUEL BELL,
Clerk Circuit Court United States,
Eastern District of Pennsylvania.

In the Supreme Court of the United States.

The Lehigh Valley Railroad Company et al., Appellants,

vs.

Edward Mellon et al., Appellees.

No. 177.

And now, December 31st, 1880, it is stipulated by the parties to the above-entitled suit, that the printed documents and plans hereto annexed, being copies of exhibits offered in evidence in the above-entitled case, as follows, viz.,—

I. Copy of letters patent to Nehemiah Hodge, dated November 18th, 1851, No. 8526;

II. Copy of letters patent to Emanuel Wharton, sealed April 21st, 1854, No. 2676;

III. Copy of file-wrapper in the matter of the patent to Edward Mellon aforesaid;

IV. Copy of title-page and plates from Clark's "Railway Machinery," published in 1855;

V. Copy of "Proceedings of the Institution of Civil Engineers," Session 1863–64;

VI. Copy of letters patent to Nehemiah Hodge, dated June 22d, 1852, No. 8979;

VII. Copy of title-page and plates from Krupp's book of 1862;

shall be deemed and taken to have been filed in the office of the Circuit Court, as of the days when they were respectively offered in evidence, and shall be transmitted to the Supreme Court as part of the record, with the *certiorari* heretofore awarded in this case.

It is further agreed that the copy of the patent, printed at page seven (7) of the transcript of record, be permitted to stand as though the same had been filed when offered in evidence; but that the drawing on page 9, being incorrect, shall be replaced by copies of the plate marked "A," hereunto attached.

ALEX: D. CAMPBELL,
For Appellants.

FURMAN SHEPPARD,

DEPARTMENT OF THE INTERIOR.

UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the records of this office of the Letters Patent granted Nehemiah Hodge November 18, 1851, No. 8526, for "Improvements in Railroad Car-wheels."

In testimony whereof, I, E. M. Marble, Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed, this twentieth day of December, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fifth.

Seal of U. S. Patent Office.

E. M. MARBLE,
Commissioner.

Deft's Exhibit D.—Hodge Patent of 1851.

No. 8526.

UNITED STATES OF AMERICA.

To all to whom these Letters Patent shall come:

Whereas, Nehemiah Hodge, of Adams, Mass., has alleged that he has invented a new and useful Improvement in Railroad Car Wheels, which he states has not been known or used before his application; has made oath that he is a citizen of the United States, that he does verily believe that he is the original and first inventor or discoverer of the said improvement, and that the same hath not, to the best of his knowledge and belief, been previously known or used; has paid into the Treasury of the United States the sum of thirty dollars, and presented a petition to the Commissioner of Patents signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose.

These are, therefore, to grant, according to law, to the said Nehemiah Hodge, his heirs, administrators or assigns, for the term of fourteen years from the eighteenth day of November, one thousand eight hundred and fifty-one, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, a description

whereof is given in the words of the said Hodge, in the schedule hereunto annexed, and is made part of these presents.

In testimony whereof, I have caused these letters to be made patent, and the seal of the Patent Office has been hereunto affixed.

[SEAL.] Given under my hand, at the City of Washington, this eighteenth day of November, in the year of our Lord one thousand eight hundred and fifty-one, and of the independence of the United States of America the seventy-sixth.

ALEX'R H. H. STUART,
Secretary of the Interior.

Countersigned, and sealed with the seal of the Patent Office.

THOS. EWBANK,
Commissioner of Patents.

THE SCHEDULE REFERRED TO IN THESE LETTERS PATENT, AND MAKING PART OF THE SAME.

To all whom it may concern:

Be it known, that I, Nehemiah Hodge, of Adams, in the County of Berkshire, and State of Massachusetts, have invented a new and useful Improvement in Railroad Car Wheels, of which the following is a full, clear and exact description, reference being had to the accompanying drawing which forms part of this specification, and in which Figure 1 is a side elevation of a railroad car wheel, with my improvements applied thereto, and Figure 2 is a section of the same in a plane passing through the axis.

My invention consists in making a car wheel in not less than two concentric parts, and connecting these parts by vulcanized india rubber or other analogous elastic material, interposed between them; whereby the annular or outer part of the wheel, is insulated from the central or inner part by a substance that will not transmit vibrations from the rim to the centre or axle of the wheel, whether such vibrations be lateral or radial in direction.

My invention consists, further, in a method of connecting the

several parts of a sectional wheel, by interposing between the parts to be connected an elastic substance in a compressed state, which, by its tendency to expand in all directions, holds the parts of the wheel in place without the use of screws, bolts, keys, rivets, or other fastenings liable to work loose.

The wheel represented in the accompanying drawings to exemplify my invention consists of a body, *A*, and of a rim, *B*, of metal, which are connected by an annular cushion of vulcanized india-rubber, *C*, surrounded by a series of annular segments, *D*, of metal.

The body, *A*, is made with a central hub, in the usual manner, to connect it with the axle, and at its periphery has a groove formed in it to receive the inner side of the ring of india-rubber, *C*, which enters it in the manner of a tongue; the ring of india-rubber is made in segments, for the sake of convenience. The india-rubber is surrounded by a metal ring, *D*, made in segments, whose inner periphery has the form of a hollow cylinder with an annular groove sunk in it, that corresponds with the groove on the periphery of the body, and receives the outer side of the india-rubber ring; the outer periphery of these segments is in the form of the frustum of a cone with an annular groove running around it, the side of which, at the base of the frustum, is at right angles to its axis, and the side next the top of the frustum inclines outwards from the axis at an angle of about 45°; the exterior periphery of the ring of segments, *D*, thus formed, fits the inner periphery of the rim *B*, which, in shape, is their exact counterpart; a piece is cut off the end of each of the segments to allow them to be compressed upon the india-rubber in the operation of putting the wheel together; the thickness of the outer or narrow edge of the segments should not exceed the thickness of the annular space between the body and rim near the outside of the wheel, through which it has to pass for a purpose to be hereafter described. The rim is a ring whose inner periphery, as above described, is the counterpart of the outer peripheries of the segments, and its outer periphery or tread made in the usual form of the frustum of a cone with a flange round its base.

The several parts of the wheel being shaped as described, they are next to be put together, which is done by placing the ring of india-rubber in the groove on the periphery of the

body *A*; the segments *D* are then applied to the outside of the india-rubber which enters the grooves on their inner periphery; the rim is now laid upon a firm bench, with its widest end upwards, and the body surrounded by the ring of india-rubber, and the conical segments are forced down the smallest end foremost into the rim by means of a hydraulic or other powerful press in a manner similar to that in which car wheels are commonly forced on to their axles. As the small end of the segmental ring enters the wide end of the rim, the segments come in contact with the inner surface thereof, which gradually converges towards the outside of the wheel, and as the segments move downward compresses them upon the India-rubber and condenses the latter until the outer diameter of the small end of the segments is contracted sufficiently to pass the narrowest part of the interior of the rim, when the elasticity of the India rubber will again force the segments to expand until the inclined or bevelled side of the groove is brought to coincide with the chamfered inner corner of the outer edge of the rim, and the square side of the groove fits into the rabbeted inner corner of the inside of the rim. The pressure may now be removed, and the several parts of the wheel will be found to be connected together in their proper relative positions with greater or less firmness, as the radial dimensions of the India rubber ring before the wheel was put together exceeded more or less the radial dimensions of the groove or space which it now occupies between the segments and the body of the wheel, and the force required for pressing the parts of the wheel together will be in like manner greater or less. If it should be required to take the wheel apart, it is merely necessary to turn it over and apply the pressure against the opposite side of the body and segments. The power required to force out the segments and body from within the rim will be greater than that required to enter them, as the angle formed with the axle by the surface of the chamfer on the inner corner of the outside of the rim is greater than the angle formed with the axle by the inner surface of the rim, within the chamfer. The ring of India rubber in a wheel thus constructed acts as an annular key or tongue to keep the body and rim in the same plane by entering their adjacent grooves and holding itself there by its own elasticity, so that the inner and outer parts of the wheel cannot

separate in running without either being broken, or else shearing the ring of India rubber into two annular pieces, the latter being next to impossible and the former being much less likely to happen in this than in the common wheel. The proportion which the radial width of the India rubber before insertion in the groove must exceed the radial width of the space in the wheel for its reception, in order that the rubber may be subjected to the proper amount of compression to cause it to act with the requisite amount of elastic force, will depend upon the texture of the rubber itself, as for example, whether it be more or less dense or hard, and also upon the thickness and width of the elastic ring itself, and whether, also, the track it is designed to run upon be rough or smooth; and taking these modifying circumstances into consideration, each constructor will have to exercise his own judgment as to the proportions most suitable in each particular case.

It will now be seen that in the wheel thus constructed the rim is insulated from the body by the ring of India rubber, which, being elastic, yields to pressure in any direction and acts as a spring cushion to intercept the jars produced by irregularities in the track or in the tread of the wheel; it is evident that this office of the spring cushion is exerted in a lateral as well as a radial direction, for the body and rim are retained in their relative positions solely by the ring of rubber, which is elastic in every direction; the wheel, therefore, is essentially elastic and relieves the car from the jars resulting from the striking of the wheel flange against the side of the rail, as well as from those due to the passage of the tread of the wheel over sudden elevations and depressions on the top of the rails.

The method I have described of constructing this elastic wheel is that which I prefer, but it will be evident to the skillful engineer that the wheel I have described may be modified in form and construction without affecting the principle of universal elasticity which this invention embodies; thus, for example, the rubber may be inserted in the form of a disconnected series of blocks, instead of in the form of a continuous band; or the rim and body of the wheel may be made in any known or approved way, and if it be found that the elastic band allows too much lateral play, ears or brackets may be

body *A*; the segments *D* are then applied to the outside of the india-rubber which enters the grooves on their inner periphery; the rim is now laid upon a firm bench, with its widest end upwards, and the body surrounded by the ring of india-rubber, and the conical segments are forced down the smallest end foremost into the rim by means of a hydraulic or other powerful press in a manner similar to that in which car wheels are commonly forced on to their axles. As the small end of the segmental ring enters the wide end of the rim, the segments come in contact with the inner surface thereof, which gradually converges towards the outside of the wheel, and as the segments move downward compresses them upon the India-rubber and condenses the latter until the outer diameter of the small end of the segments is contracted sufficiently to pass the narrowest part of the interior of the rim, when the elasticity of the India rubber will again force the segments to expand until the inclined or bevelled side of the groove is brought to coincide with the chamfered inner corner of the outer edge of the rim, and the square side of the groove fits into the rabbeted inner corner of the inside of the rim. The pressure may now be removed, and the several parts of the wheel will be found to be connected together in their proper relative positions with greater or less firmness, as the radial dimensions of the India rubber ring before the wheel was put together exceeded more or less the radial dimensions of the groove or space which it now occupies between the segments and the body of the wheel, and the force required for pressing the parts of the wheel together will be in like manner greater or less. If it should be required to take the wheel apart, it is merely necessary to turn it over and apply the pressure against the opposite side of the body and segments. The power required to force out the segments and body from within the rim will be greater than that required to enter them, as the angle formed with the axle by the surface of the chamfer on the inner corner of the outside of the rim is greater than the angle formed with the axle by the inner surface of the rim, within the chamfer. The ring of India rubber in a wheel thus constructed acts as an annular key or tongue to keep the body and rim in the same plane by entering their adjacent grooves and holding itself there by its own elasticity, so that the inner and outer parts of the wheel cannot

separate in running without either being broken, or else shearing the ring of India rubber into two annular pieces, the latter being next to impossible and the former being much less likely to happen in this than in the common wheel. The proportion which the radial width of the India rubber before insertion in the groove must exceed the radial width of the space in the wheel for its reception, in order that the rubber may be subjected to the proper amount of compression to cause it to act with the requisite amount of elastic force, will depend upon the texture of the rubber itself, as for example, whether it be more or less dense or hard, and also upon the thickness and width of the elastic ring itself, and whether, also, the track it is designed to run upon be rough or smooth; and taking these modifying circumstances into consideration, each constructor will have to exercise his own judgment as to the proportions most suitable in each particular case.

It will now be seen that in the wheel thus constructed the rim is insulated from the body by the ring of India rubber, which, being elastic, yields to pressure in any direction and acts as a spring cushion to intercept the jars produced by irregularities in the track or in the tread of the wheel; it is evident that this office of the spring cushion is exerted in a lateral as well as a radial direction, for the body and rim are retained in their relative positions solely by the ring of rubber, which is elastic in every direction; the wheel, therefore, is essentially elastic and relieves the car from the jars resulting from the striking of the wheel flange against the side of the rail, as well as from those due to the passage of the tread of the wheel over sudden elevations and depressions on the top of the rails.

The method I have described of constructing this elastic wheel is that which I prefer, but it will be evident to the skillful engineer that the wheel I have described may be modified in form and construction without affecting the principle of universal elasticity which this invention embodies; thus, for example, the rubber may be inserted in the form of a disconnected series of blocks, instead of in the form of a continuous band; or the rim and body of the wheel may be made in any known or approved way, and if it be found that the elastic band allows too much lateral play, ears or brackets may be

secured to the body of the wheel to limit the distance to which it or the rim can yield laterally.

If it is found advisable to increase the elasticity of the wheel in a lateral direction, this can be done either by increasing the radial width of the band of India rubber, and the space between the body and rim of the wheel, or by inserting in the wheel several concentric cushions of rubber.

The foregoing modifications are merely suggested for the purpose of indicating the great variety and extent of changes that may be made in the structure of the wheel, without any departure from the principle which I have invented, and which is susceptible of almost unlimited variation, while still preserving its essential characteristic, which is the insulation of the tread or rim of the wheel from the axle, hub or main body of the same, by an intervening cushion of some elastic substance, that will yield in every direction so as to impart to the wheel both radial and lateral elasticity.

What I claim as my invention, and desire to secure by Letters Patent, is connecting the tread or rim of a car wheel to the hub or central part thereof by means of india rubber or other analogous elastic material, such elastic material being connected with the outer periphery of the central part of the wheel by a groove on the latter, or its equivalent, and to the inner periphery of the rim; also by a groove thereon, or its equivalent; the india rubber holding itself in both grooves by its elasticity, and giving to the wheel lateral as well as radial elasticity, as herein described.

I also claim the grooved segments constructed substantially as herein described, and interposed between the India rubber and the rim, for the purpose of facilitating the insertion of the India rubber into the space between the rim and central part of the wheel and its removal therefrom, as herein set forth.

In testimony whereof, I have hereunto subscribed my name.

NEHEMIAH HODGE.

Witnesses:

P. H. WATSON,

J. S. SMITH.

DEPARTMENT OF THE INTERIOR.

UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the bound volumes of the library of this office of the specification and drawing in the matter of the English Letters Patent granted Emanuel Wharton, November 19, 1853, No. 2695, "Improvements in the Manufacture of Railway Wheels."

In testimony whereof, I, E. M. Marble, Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed, this twentieth day of December, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fifth.

Seal of U. S. Patent Office.

E. M. MARBLE,
Commissioner.

Deft's Exhibit Wharton Patent of 1854.

A. D. 1853. No. 2695.

RAILWAY WHEELS.

Letters Patent to Emanuel Wharton, of Birmingham, in the County of Warwick, Engineer, for the Invention of "Improvements in the Manufacture of Railway Wheels." Sealed the 21st April, 1854, and dated the 19th November, 1853.

Provisional Specification left by the said Emanuel Wharton, at the office of the Commissioners of Patents, with his petition, on the 19th November, 1853.

I, Emanuel Wharton, of Birmingham, in the County of Warwick, Engineer, do hereby declare the nature of the said Invention for "Improvements in the manufacture of Railway Wheels," to be as follows, that is to say:

My invention consists, firstly, of improvements in fixing tyres on wheels in such a manner that should the tyre get loose or break, it is prevented from flying off. Fig. 1, is an elevation; Fig. 2, a cross section of an engine wheel 5½ ft. in diameter; Figs. 3 and 4, are enlarged sections of the same. This wheel is made in two halves, as shewn in Figs. 2, 3, 4, for the purpose of securing firmly between them the tyre (C), which has a dovetail rib (B) formed round the internal circumference in the middle of its breadth. The tire is turned slightly taper on each side of the dovetail rib (B), and in putting the wheel together the tire may be slightly heated. The halves of the wheel are then drawn tight into the tyre with bolts and nuts until they are in close contact, and have a firm hold of the dovetail rib (B). Distance pieces (D, Figs. 2, 3

and 4,) being placed between the arms of the wheel; the screw bolts are then removed one at a time, and rivets inserted in their places, and the whole firmly riveted together. It is also riveted through the nave or boss in the same manner. When a tire is worn out the wheel is separated by removing the rivets, and a new tyre put on in the manner before described. In case steel or steeled tyres are used they may, if necessary, be put on without being heated, and bolts and nuts may be used instead of rivets, if considered desirable. Figs. 5, 6, 7, 8, show another method of attaching the tyre to a wheel of ordinary construction. It consists in forming a rib (E, Figs. 6, 7, 8,) on one side of the interior circumference of the tyre (C), and a second rib (F) formed round the outer circumference of the felloe of the wheel. These ribs are turned to an angle or dovetail on one side, and when put together fit into corresponding dovetails formed on the wheel and tyre, locking into each other as shown at (E, F,). There is a smaller rib (G,) formed on the other side of the internal circumference of the tyre, which is clinched or riveted over the rib (F,) after the tyre has been shrunk on. The tyre in putting it on to the felloe must be heated to a red heat, expanding it until the rib (F) on the felloe will pass freely into the tyre (C) at the rib (G). When the tyre has contracted firmly on the felloe, the rib (G) will enclose it about five-sixteenth of an inch, as seen at (G, F, Fig. 8). The rib (G) is then clinched or riveted over, as seen (G, F, Figs. 6 and 7,) perfectly securing the tyre. Instead of clinching or riveting over the rib (G), the cavity shown between (G and F, Fig. 8,) which is for convenience in getting on the tyre, may be filled up with iron or any suitable hard metal. Figs. 9 and 10 show a smaller wheel, of the description known as the back to back spoke wheel, having the tyre secured to it in manner before described; the iron which forms the arms and felloe of the wheel being rolled with the requisite ribs before named.

The next part of my improvements is shown in Figs. 11 and 12, being the elevation and section of a wheel composed of wood and iron. The centre K, K, is made of strengthened cast iron, round which are placed the hard wood segments (S^1), forming the entire circle (W), is a wrought iron hoop shrunk on to the segments and binding them all firmly together. The

tyre is shrunk on to this inner hoop (W), and secured in the same manner described and shown at (Figs. 5, 6, 7, 8.) In making this wheel the segments are cut from a plank of hard wood, and placed the endway of the wood radial to the centre of the wheel. The segments are then roughly turned inside and out to the proper size, and placed round upon the cast iron centre. A flexible hoop of wrought iron is then placed round them. This hoop is made with a lap-joint for the purpose of folding when contracted on the wood segments. To contract the hoop, it is made conical on the outside, so that when forced down a die of the same angle as itself it is contracted to a less diameter, compressing the wood into a firm state by uniform circumferential pressure. This may be effected by an hydraulic press, and after the wood has been subjected to sufficient pressure it should be allowed to remain a short time to set. When taken from the press the flexible hoop is removed, and the permanent one (W,) is put on in a red hot state and instantly cooled by water. When the hoop has been turned, it is ready to receive the tyre, which is put on in precisely the same manner as that described and shown in Figs. 5, 6, 7 and 8.

SPECIFICATIONS IN PURSUANCE OF THE CONDITIONS OF THE LETTERS PATENT, FILED BY THE SAID EMANUEL WHARTON, IN THE GREAT SEAL PATENT OFFICE, ON THE 16TH MAY, 1854.

To all to whom these presents shall come: I, Emanuel Wharton, of Birmingham, in the County of Warwick, Engineer, send greeting:

Whereas, her most Excellent Majesty Queen Victoria, by her Letters Patent, bearing date the nineteenth day of November, in the year of our Lord one thousand eight hundred and fifty-three, in the seventeenth year of her reign, did, for herself, her heirs and successors, give and grant unto me, the said Emanuel Wharton, her special license, that I, the said Emanuel Wharton, my executors, administrators and assigns, or such others as I, the said Emanuel Wharton, my executors, administrators and assigns, should at any time agree with, and no others, from time

to time, and at all times thereafter during the term therein expressed, should, and lawfully might make, use, exercise and vend within the United Kingdom of Great Britain and Ireland, the Channel Islands and Isle of Man, an invention for improvement in the manufacture of railway wheels, upon the condition (amongst others) that I, the said Emanuel Wharton, by an instrument in writing, under my hand and seal, should particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, and cause the same to be filed in the Great Seal Patent Office within six calendar months next and immediately after the date of the said Letters Patent.

Now, know ye, that I, the said Emanuel Wharton, do hereby declare the nature of my said invention, and in what manner the same is to be performed, to be particularly described and ascertained in and by the following statement, reference being had to the drawings hereunto annexed, and to the letters and figures marked thereon, that is to say:

My invention consists of improvements in forming and combining the parts of railway wheels to prevent, as far as possible, accidents arising from the breaking and flying off of portions of the tyres.

Description of the Drawings.

Figure 1 is an elevation of an engine wheel constructed according to the first part of my improvements.

Figure 2, a section of the same.

Figures 3 and 4, enlarged sections of same, showing the dedetails more clearly.

Figures 5, 6, 7, 8, 9, elevations and sections of an engine wheel, showing another mode of securing the tyre suited to the variation in the construction, this wheel having single arms or spokes instead of double.

Figures 10 and 11, elevation and cross section of a railway-carriage wheel, made somewhat on the principle of the engine wheel shown in Figures 1, 2, 3 and 4.

Figures 12 and 13, elevation and section of a "back-to-back" spoke wheel, showing the tyre secured as in Figures 5, 6, 7, 8 and 9.

Figures 14 and 15, sections of wheels on the same principle as Figures 1 and 2, but somewhat differently constructed.

I will now proceed to describe the construction of the engine wheel shown in Figures 1, 2, 3, and 4. This wheel is made in halves for the purpose of securing the tyre firmly between them. It will be seen on reference to the drawings that the tyre (*C*) has a dovetailed rib (*B*), which may be of any suitable form, but I prefer those shown at (*B B*) Figures 3 and 4, formed round its inner circumference, and in the middle of its breadth; the tyre is turned with a slight taper on either side of the rib (*B*), and in putting the wheel together the tyre may be slightly heated. The halves of the wheel (*A A*) are then drawn tightly into the tyre with bolts and nuts, until they come into close contact and have a firm hold of the dovetailed rib (*B*). Distance pieces (*D*) are then placed between the arms of the wheel; the screw bolts are removed one at a time, rivets being inserted in their places, and the whole is securely riveted together; or bolts and nuts may be employed instead of rivets, if considered desirable. When a tire is worn out and a new one required, it is merely necessary to separate the parts of the wheel by removing the bolts or rivets, and put on a new tyre in manner described. In cases where steel, or iron tyres steeled, are to be used, they may, if necessary, be fixed without heating. The wheel shown in Figures 5, 6, 7, 8 and, 9, being a single spoke wheel, requires a differently constructed tyre, but still adhering to the principal of dovetailing. This I accomplish by forming a rib (*E*) on one side of the internal periphery of the tyre (*C*), and another rib (*F*) on the outer periphery of the felloe (*W*). Each rib has one of its sides turned to a dovetail form of a suitable angle, as shown, and fitting, when put together, into a corresponding dovetail on the felloe or the tyre, as the case may be (for it will be seen on reference to the drawings, that section Figure 8 shows the same parts as Figure 7, only that the position of the ribs (*E* and *F*) are reversed); thus, the dovetails lock one into the other. The smaller rib (*G*) on the other side of the inner periphery of the tyre, is for the purpose of being clenched or riveted over the rib (*F*) on the felloe after the tyre has been shrunk on. The tyre when put on the felloe, having been previously heated to a good red heat, will expand until the rib *F* will pass freely into the tyre at the rib *G*; and

when the tyre, by cooling, has contracted firmly on the felloe, the rib *G* will enclose the rib *F*, leaving a small groove or space, as seen at (*G F*) Fig. 9. The small rib *G* is then clenched or riveted down, as seen in Figures 6, 7 and 8, or the cavity between the ribs *G* and *F*, see Fig. 9, may be filled with any suitable hard metal, instead of clinching or riveting the rib *G*. Figures 10 and 11 are an elevation and section of a carriage wheel, made in halves, in the same manner as that of the larger wheel seen in Figures 1 and 2, but instead of the arms and felloe being formed as therein shown, I propose to form those parts of circular boiler plates of suitable thickness, either as a disc wheel or by piercing out portions, if preferred, as shown at Figure 10. The peripheries of the plate (*A*) are turned down at right angles, in moulds, for the purpose of enclosing the dovetail rib *B* for securing the tyre, see Figure 11; the boss being either of iron cast on in the ordinary manner, or, if requisite, may be of wrought iron. Figures 12 and 13 are an elevation and section of another carriage wheel, usually termed the back-to-back spoke wheel, showing the tyre secured in manner the same as that of the larger one described in Figures 5, 6, 7, 8 and 9, the iron forming the arms and felloes having the rib *F* rolled with it, as seen by the dotted lines F, F, F, in Figure 12, and in section Figure 13. Figures 14 and 15 are sections of wheels made on the same principle as already described under Figures 1 and 2, 10 and 11, but with these variations: In that shown at Figure 14, I propose to make the arms and felloe of L shaped iron, the arms being back to back in the ordinary manner, same as shown at Figures 12 and 13; but the wheel will be made in halves as at Figures 1 and 2, and 10 and 11. Figure 15 is on the same principle, only that the arms and felloe will be made of T iron. These may be secured by either cast or wrought iron bosses, as may be required.

Having thus described the nature of my said invention, and in what manner the same is practically to be carried into effect, I wish it to be clearly understood that I do not confine myself to the precise details herein specified, so long as the main features of my invention be retained; but that which I claim is, the improvements described in the manufacture of railway

wheels, together with the several methods specified of attaching and securing the tires to such wheels, in manner herein set forth and described.

In witness whereof, I, the said Emanuel Wharton, have hereunto set my hand and seal, this tenth day of May, in the year of our Lord one thousand eight hundred and fifty-four.

EMANUEL WHARTON. [L. S.]

truncated cones, connected by a shaft, does not alter these conditions. The flanges, if of exactly equal diameter, will represent a cylinder, and will roll forward on a plane, in a straight line, without friction.

When such wheels are placed on rails, a new condition arises: the wheels may run on equal diameters to suit a straight line, or on varying diameters to suit curves, provided always, that there be sufficient traverse or play between the rails to allow sufficient variation of the diameters to suit the varying length of the two rails. If there be not this play, the compensation of the cones is a fallacy, and the movement ceases to be a rolling movement, and becomes a sledging movement, even supposing the rails to be true and accurate segments of circles, with perfect tables and equal bearings.

Thus far with regard to a single pair of wheels; but when two pairs of wheels are connected together to a frame to form a carriage on the usual plan, other conditions arise. If the axels be parallel to each other, and the wheels be in the same plane, the carriage will run without friction on a straight line; but on a curve a larger amount of play in the rails would be needed. And there would be yet another difficulty, the rigid construction of the carriage prevents the axles diverging from their parallelism and pointing truly to the centre of the curve,—a condition necessary to the fulfilment of the mechanical requirements. The longer the carriage, *i. e.*, the farther the axles are apart, the greater becomes the friction. Supposing that the axles are parallel, but that the wheels are out of plane with each other, then the wheels will become partial, but constant, sledges under all circumstances; and supposing that the axles are not parallel, but at an angle with each other, then also the wheels will be sledges, and will only roll when passing round curves corresponding to the angle.

All this is on the supposition, that a railway is composed of straight lines and curves, with the rails perfectly true and smooth. But in practice, the conditions are quite different. Examining the rails closely, there is found to be an incessant alteration of surface across their breadth. Sometimes the bearing of the wheels is inside the rail, and sometimes outside, on straight lines; and sometimes in a series of small curves, changing from one side to the other of the same rail.

The theory of the compensatory action of the coned tires, to accommodate them to straight lines, or curves, can only be based on the supposition, that such tires run on a surface of little breadth—knife—edges. The theory of the rail is, that it should be so pitched inwards, as to keep the table parallel to the cone of the wheels. If it be not so pitched, the engine wheels will soon grind, or crush the rail table down to a corresponding form. This condition will induce friction between the tire and the rail, of questionable utility for the purpose of adhesion in the case of the engine wheels, but certainly mischievous in the case of all the other wheels in the train. In truth, the theory of conic compensation cannot be reduced to practice, in the present state of railway mechanical art. The practical compensation is in the constant change from rolling to sliding movement, when the rolling of either wheel on the same shaft is too fast, or too slow for the length of the pathway,—and the result is impedimental friction.

If proof were wanted of this, it might readily be given in the "glint" on the surface of the rails, after the passage of a train; or in the fine black iron dust which adheres to the finger from this polished surface. It is not produced by rolling action, for that leaves a dead and not a bright surface; it is a "burnishing" action, a sliding of surfaces, which induces the bright polish. Another instance may be adduced. It is well known that rails long worn in chairs present, when reversed, a series of notches, of more or less depth, on the rail table, causing an unpleasant jerking sensation to the carriages. Gradually the edges of the notches become worn down, and the rectangular notches first become small curves, then curves of larger radius, and finally disappear altogether, the rail surface becoming a plane. Theoretically, supposing only a rolling movement, the wear on the curves ought to be equal to the wear on the intermediate portion; and that it is not so, indicates that there has been sliding, and abraiding or planing action. On the other hand, railway wheels, after long use, become hollow on the periphery across their breadth, the outside forming as it were, an external flange. If the wheel merely rolled, the tire ought to become constantly harder and more solid, as it were "hammerhardened," but practically it is ground away by the expenditure of engine power on impedimental friction. What this may occasionally amount to may

be judged of, by a fact recorded by an experimenter on railway machinery viz., that a train of coal wagons, though without breaks in action, would not run down an incline of 1 in 75 without the application of engine power.

Goods trains are usually coupled, *i. e.*, attached loosely by slack chains from wagon to wagon. A goods driver, when starting his train into motion, first pushes back all the wagons together, one against the other. He then starts the first, and then the second, and so on, getting the whole train gradually into motion. If the train were closely coupled, the engine would only slip the wheels without moving the train. If the train be watched from a bridge, each wagon will be noticed moving on an irregular, sinuous, zigzag path, and independent of its neighbor, save when snatched by the chains. If a passenger train be watched from the same bridge, it will be found to keep an apparently even course. The reason is, that the various carriages forming the train are closely coupled together, with the spring buffers in contact. With loose couplings the carriages would oscillate laterally by their wheels seeking the path of least friction; this would annoy the passengers; therefore steadiness is preserved at the expense of sledge-like movement, additional friction, and steam power.

But, inasmuch as the conic compensation can only come into action by the lateral traverse of the wheels, and as at high speeds there is no time for such traverse, it follows that a large proportion of the movement along the rails must be sledging instead of rolling. While thus travelling the action of the unequal path produces a torsion of the axle, which first winds round like a spring, and then, from time to time, is freed by the inequalities of the rails, and induces blows; and as the wheel-tires become hollowed, lateral traverse is altogether prevented, and the rails are severely strained.

It is a common practice on railways to elevate the outer rail on curves, with the object of counteracting, by inward gravitation, the centrifugal force tending to throw the train off the line; and this is occasionally done to the elevation of six inches above the inner rail, on a curve of six hundred feet radius, equivalent to an incline of one in nine; and consequently, the weight is proportionately heavier on the inner rail, and lighter on the outer rail. Theoretically, the inward gravitation is calculated to balance the centrifugal force on

curves, and therefore, at high speeds, the grinding of the flanges ought not to be greater against one rail than the other; and, at slow speeds, the grind ought to be entirely against the inner rail. But the direct contrary is the fact; the inner edge of the outer rail is ground by the wheel flanges, and the the top of the inner rail is worn by the tread of the wheel. The reason is, that the inner wheel runs in a larger diameter than the outer, and by the greater weight on it, has more bite than the outer, and consequently governs the whole movement, overpowering the inward gravitation, and assisting the centrifugal force to closer contact with the outer rail. To avoid the destruction arising from these faulty principles of construction, steel is now used both for tires and rails. Better construction would enable iron to do its work at a much less cost however, by imparting a rolling movement in the place of a sledging movement.

Some of the earliest tires were of Staffordshire iron. This iron squeezed and rubbed out under the loads. Different kinds of Yorkshire iron were then chiefly used, such as Low Moor, Leeds, Bowling, Park Gate, and others; but increasing loads rendered these inefficient; and various attempts were made to steel the surfaces of English iron. Krupp's steel became the standard of quality, which Bessemer and others are now endeavoring to equal, if not excel, by a cheaper process. And, though Krupp's steel has not yet been used for rails, Bessemer steel is largely applied on the London and North Western and other lines. Thus, the cost of rails varies from Welsh iron at £6 per ton to that of Bessemer steel at from £16 to £20 per ton. And the cost of tires varies from Staffordshire iron at £10 per ton to Krupp's steel at £70 per ton.

One great mechanical difference between iron and steel is, that the former is manufactured from a number of pieces, imperfectly welded together, with a scale between the welds, making it all more or less "scrap iron," and liable to separate into parts under blows and pressure. Steel, on the contrary, being cast into one homogeneous mass without welds, is not subject to disintegrate, and is sufficiently hard not to rub away easily. Yet there are circumstances under which it does wear away more rapidly than iron. A number of steel-surfaced tires, which were used on a line through a sandy district, had been hardened and ground to a face; but these tires wore out

faster than iron tires upon the same line. The reason was plain; the blowing sand bedded itself in the substance of the soft rails, but acted as a grindstone on the hard steel, precisely like an emery stick.

It was after a long study of these facts that the author turned his attention to the possibility of a remedy. An obvious one was the loose wheel; but this involved alterations in structure, increase in the number of parts, provision for lubrication, and amongst other conditions, to get elastic resilience as close as possible to the percussive action between tire and rail. A spring-wheel was the next suggestion; but spring—wheels had been experimented on many years before, with the result that a spring frame to a wheel did not answer; and thus arose the question, whether it was practical to make a spring tire that would accommodate itself to every variation of surface, like a horse's foot?

A loose tire is one of the things denounced as a source of danger on railways, and to be carefully guarded against. It is most dangerous in the case of a tire fastened with through bolts or rivets, because it indicates that the tire has lost the condition of a true circle, and has become a ring of many segments, constantly striking blows. But a tight tire is also a source of danger, by reason of its tendency to burst, especially in time of frost. The author, therefore, came to the conclusion that a tire neither loose nor tight, but fitting elastically to the wheel, was the safest of all, as there can be no tendency to burst, with sufficient yield to prevent the mischievous effect of blows, as a result of keeping constantly in contact, while a slightly pliant surface induces a better adhesion of the driving wheels, and freer movement of the train wheels. There is an apparent objection to change of form in the circle of the tire, but not if the tire be elastic.

Being satisfied of these conditions, the author devised the following plan. A tire with a deep front rib was bored out internally to a cone, parallel to the tread of the tire; this cone was hollowed out to a depth of a quarter of an inch, leaving a flat edge of three-eighths of an inch on each side. On this was laid a hoop of spring-steel, tempered. The periphery of the wheel was then turned to a curve across the breadth, corresponding to the curve in the tire. Into the cone formed by the spring the wheel was pressed, with a force equal to three bolts

of one inch in diameter, and confined there by a flat ring, sprung into a groove in the back of the tire. The author was satisfied with the principle and the mechanical arrangement; but there remained the great difficulty of persuading engineers of the advantages of the system. At length an opportunity for making the experiment was conceded. A set of wheels was selected of the class known to be the most destructive to tires —solid discs of wrought iron—which by their rigid action crushed the metal on the rails. The peripheries of the wheels were turned to a curve; the hoop spring below was $\frac{5}{16}$ths of an inch thick, and $3\frac{1}{2}$ inches wide. The tires were of Staffordshire iron, with a deep front rib, and a false rib, or flat ring in a groove at the back. The wheel was forced in on the steel hoop by the pressure of two bolts, each one inch in diameter, and the flat ring was sprung into its place, with elastic expansion. The set of wheels was applied to a heavy carriage on the North London line, and ran upwards of 106,000 miles without being turned up, and with scarcely any perceptible difference in their surface, the flanges being absolutely unworn; while Low Moor tires, under the same condition, were heavily worn, both in flange and tread.

On another line, the four coupled wheels of a six-wheel engine were fitted with similar tires, which ran about twelve months. These were very imperfect. The tires of Staffordshire iron, badly made, were reedy, and separated into strips. The springs were in single layers, were too weak for the work, and had to be replaced; but some remarkable facts were developed.

The tires, when so loose as to be moved round the lifted wheel by hand, in fact having a $\frac{1}{4}$-inch play, were found to be equally efficient in adhesion and draught. The tires did not slip on the rails, but the wheels did slip within the tires, just sufficiently to compensate for the difference in length of pathway round sharp curves. Finally, however, this engine was broken up, the boiler being too old to be used with safety.

On the same line, on curves where the wear on the leading wheels of the engine was so severe that with new wheels, after running only 9,000 miles, the flanges needed "turning up," a pair of Leeds tires was applied with springs, and ran 25,240 miles before "turning up" was required: At the same time, a

similar engine was contrived with a "bogie" for the leading axle to traverse upon curves, so as to give abundant lateral traverse to the wheel cones, with the same quality of tires, and the result was, that the spring tires, without this advantage, gave an equally good result.

This new system of wheels, but with double instead of single spring hoops, was applied by Mr. Cross, the engineer of the St. Helen's Railway, Lancashire. The line is one of the most remarkable for its heavy gradients and sharp curves; the gradients being 1 in 35, 1 in 70, and 1 in 85, while the curves are of 300 and 500 feet radius, and moreover the points and crossings are very frequent, 12 miles of sidings occurring in a distance of 2 miles from the St. Helen's station, the total length of the line being 30 miles.

Mr. Cross states, date September 4th, 1861, that——

"The tires are giving great satisfaction. I had them made of common Staffordshire iron, and put under a six-wheeled coupled engine, weighing 21 tons, and they have now run 29,429 miles, with heavy trains. On this line the gradients are all heavy, with the sand constantly in use, yet the wear has been very slight. I am so satisfied, that when I get a new locomotive I shall have similar tires."

From a tabular statement* of the performance of four classes of tires on the St. Helen's Railway, compared with each other, viz., Krupp's steel, Swedish iron, Hood and Cooper's best Yorkshire iron, and Staffordshire iron, with springs between the tire and the wheels, it appears that Swedish iron (Engine No. 27) has less than three-fourths the durability of

Comparative wear of four classes of engine tires on the St. Helen's Railway Lancashire, demonstrating the superior economy of spring tires:—

No. of Engine.	No. of wheels.	Do. Coupled.	Diameter of Wheels.		Weight.		Miles run.	Slip of Wheels.	Remarks.	Class of Tire.
			ft.	in.	tns.	cwt.				
23	6	4	4	6	19	15	40,843	Slipped even in dry weather.	Needed turning up.	Krupp's steel.
4	6	4	4	6	20	6	20,798		Ditto.	Hood and Cooper's best iron.
27	6	4	4	6	23	14	34,006		Do. and been turned once.	Swedish iron.
18	6	6	4	0	21	0	55,138	Scarcely ever slip.	Never turned up nor needing it.	Staffordshire iron, with springs between the wheel and the tire.
							71,902		Before being turned up.	

Hood and Cooper's Yorkshire; that Krupp's steel has run twice the distance of Hood and Cooper's; and comparing Staffordshire tires, with springs (Engine No. 18), with Krupp's steel (Engine No. 23), it appears that the former has two more coupled wheels, $\frac{1}{9}$th less in diameter, $\frac{1}{13}$th more weight, has run $\frac{1}{3}$rd more mileage, scarcely ever slips, and that the tires have not been turned up or needed it. The total distance run by Staffordshire tires before reducing the flanges was 63,913 miles, as against Krupp's 40,843 miles. But, inasmuch as Krupp's steel tires were 4 feet 6 inches in diameter, and the spring tires were only 4 feet in diameter, credit must be taken for one-eighth more revolutions in the latter, making the distance run by the latter equivalent to 71,902 miles, as against 40,843 miles of the former.

The sections, Plate 8, Figs. 1, 2, and 3, show the wear of three out of these four different classes of engine tires; all the templates of the wear being taken from plaster casts. It will be perceived, that with the exception of reducing the depth of the flanges, the spring tires do not need turning up, and apparently may be worn out without turning up save the reduction of the flanges.

That wear occurs at all is, however, an indication that yet more is required in principle. It should be observed that the tires most worn on the six-wheeled coupled engine, are those with the smallest load. The reason for this apparent paradox is, that the load on the leading wheels is probably not enough to give adhesion on the rail, and to force the wheels to slip within the tires for compensation, which the more heavily-loaded wheels do.

The principle needed, in addition to the moving tire, is that of radiating axles. The flanges of the spring wheels are saved from wear on curves, partly by slipping round, and partly by horizontal rocking on the curved periphery of the wheel. The flange of a rigid tire acts as a shearing machine; it cuts the rail, and is cut by the rail. The flange of a spring wheel, if it touches the rail, yields and springs up, while the tread fits itself to all inequalities of the rail. But the spring tire, in common with the rigid tire, is occasionally obliged to slide across the rail-table, laterally, and this action is mischievous, though in a less degree.

As early as the year 1835, this defect in structure was noticed by the author; but till the year 1861 no plan of the many he devised could be made to accommodate itself to the old systems; all, however, had reference to the radiation of the axles on curves. It may be in the recollection of some engineers, that the author was the inventor of a spring, known as the "bow spring," which gave free elastic action in every direction, saving the frame from blows, by permitting the wheels to recoil laterally, and fore and aft, and diagonally, with a perfectly easy vertical motion. These springs were used without axle-guards, as the latter impeded the action of the springs, and caused noise. The absence of the axle-guards was objected to as involving risk, but the direct reverse was once proved in a remarkable manner. An engine ran into a train of empty carriages on a siding, some of the carriages being on bow springs, without axle-guards, and some on common springs, with axle-guards. The result was that the axle-guards were, in several vehicles, broken off, by sudden contact with the boxes and wheels, while the bow-spring vehicles sustained no damage. On another occasion, where a shed-roof fell in on a train, some of the carriages were saved from damage by their elastic bow springs, but the others suffered.

While experimenting with a bow-spring carriage, it was noticed that, though generally easy and free from excessive vibration, there, from time to time, occurred a hard and unpleasant grinding. This always happened on curves, and the reason was obvious: the front wheel on the outer rail, and the hind wheel on the inner rail, were brought in forcible contact with their flanges; and consequently recoiled, forcing the axles in the opposite direction to that which should have been assumed, viz., at a tangent, instead of radial, to the centre of the curve. To have applied axle-guards would have modified, but would not have corrected the evil; the absence of guards exaggerated it. The true position for the axles on the straight line is parallel to each other, with the wheels all in the same plane, and of the same diameter on each axle. On a curve every axle should point to the centre of the curve, and the coned diameters of the wheels should vary in proportion to the width of the gauge. In the construction of a turn table, manufacturers regard this condition; but in an engine going

round a curve, which is only an enlargement of the same action, the principle is disregarded. So also, in the ordinary "bogie" system of four wheels, the mechanical principle is imperfect, the leading wheel strikes its flange against the outer rail, the trailing wheel strikes its flange against the inner rail, and the bogie becomes more or less of a sledge; and this action is exaggerated by the action of the driving wheels, which tends to force the bogie on to the outer rail.

After some thought, the author discovered a means of causing the axle to radiate on curves, so as to insure their pointing to the centre of the curve. The axle-boxes, as applied to the ordinary wheels and axles, are supplemented with flanges, fore and aft, in curved lines, the curves being struck from central points between the axles. The axle-guards, or horn-plates, are faced to the same curves. Therefore when the flange of the front wheel touches the outer rail, the boxes slide laterally, and being only able to slide on a curved line, the axles and boxes retained in the axle-guards must point to the centre of the rail curve. The tops of the axle-boxes can also be formed in a curved line. In the centre of each box the spring-shoe rests, and therefore, on a straight line, the axle will be at a right angle, and can only leave that position by the pressure of the wheel flanges right or left of the curve. Thus the engine, or carriage, can run equally well on a straight line, or on curve.

An engine was set out by the author on eight wheels, of which four were coupled drivers in the middle, and the other four were, two on each end, on the principle of radiation just described, and this design was forwarded to St. Helen's in the year 1861. In October, 1862, Mr. Cross wrote, that he had given orders for the working drawings of an engine to be made, felt confident of success, though the design might afterwards be capable of improvement.*

Having accomplished such successful results with spring-tires, the author's attention was next turned to the possibility

* By the application of friction wheels between the drivers and the radial wheels—a plan which has been demonstrated to answer in practice with an ordinary engine—the four radial wheels become coupled-drivers, without interfering with their radial action: and a ten-driver, radial tank-engine may thus be constructed, carrying 2,500 gallons of water and rolling round curves of three chains radius.—W. B. A.

of a similar result in giving elasticity to the rails; as, supposing other things to be equal, and action and reaction to be equal between rails and tires, it follows, that the saving and economy in tires must be followed by equal saving in the rails. Most engineers insist on the necessity of elasticity in the permanent way, but to be of any value, that elasticity must be uniform, and not a system of alternate elasticity and rigidity, in which the elasticity serves to aggravate the rigidity by a succession of jumps. The line least subject to destruction would be that which is floated on the surface of a bog; but this would involve surplus engine power by a constantly rising incline in front. To make such a line perfect the superstructure should be very stiff and inflexible; as, for example, a continuous ship's deck with deep rails fastened on it. A permanent way on the broad-gauge system, with longitudinal timbers, probably does not deflect much into the ballast, but the shallow rail fastened on it bends under the wheel and deflects into the timber; and though the timber is not a rigid body like a stone, this system does not fulfil the condition of an elastic way. Neither does the narrow guage, with its rails in chairs, and its chairs on transverse sleepers, fulfil the elastic condition. The rails cannot well deflect elastically on the three-feet length from chair to chair, and ballast, if not solid and rigid, is plastic, and not elastic. The timbers are called sleepers in imitation of the builder's term, but are not sleepers in the builder's sense, for railway sleepers do not rest as timber does under a wall, but spring, and like bad walls require constant "underpinning" by the process called "packing," which the running of the trains constantly unpacks, by rolling and displacement—the longitudinals laterally, and the transverse fore and aft.

The first consideration in a permanent way is to get a firm and unyielding foundation, a very difficult thing with loose porous ballast, and also with clay or earth to which water has access. Could the surface be covered with flag stones tightly-jointed, like London pavements, the process would be easier; for ballast, intended to let the water out by the same process as the entrance, is a very inefficient arrangement. Paving the surface of a railway of small traffic might be costly at the outset; but ballasting a London street would be a far more costly thing in repairs. There can be no doubt also, that it would

be far cheaper to pave brick work viaducts, like the Blackwall and Greenwich, than to ballast them, with the liability to push out the retaining walls with the working of the trains.

That a rigid way is destructive there is ample evidence, for the granite walls of Jesse Hartley broke up rails and ties; and whenever frost sets in, and the way is rock-bound, rails and ties still break; but if an elastic way were placed on the granite wall, or rock-bound way, nothing could be better. As it is, the non-elastic superstructure disintegrates the plastic substructure, or hammers it into a rock or an arch, on which the sleepers are not level packed, but roll fore and aft.

On the passage of trains, every sleeper in succession sinks under the pressure of each wheel; the fish-joints bend and spring back; the rails rise and fall in the chairs with a clattering noise, and the wooden keys shake backwards and forwards, being retained chiefly by the ballast. The rail is bent and pressed on the chair, and the chair is pressed on the sleeper, and the sleeper strikes a blow on the ballast. It is therefore evident, that with a spring of sufficient power under the sleeper, there would be no blow. This would be a difficult mechanical arrangement, but there is another method of accomplishing the same thing—taking up the rails and chairs, and fastening longitudinal timbers upon the transverse sleepers by spikes, and then replacing the rails and chairs; and spacing the chairs on the longitudinal timbers intermediately to the transverse sleepers. This plan has been tried on the North London main line. The rails were fixed to the longitudinal base by cast-iron brackets, bolted to and through the rails, leaving a distance of an inch and a half between the lower table of the rails and the longitudinals, which, not being packed below, formed a uniform elastic base without any hard points. A short length, laid in January, 1862, during rain, has never been touched, and according to the report of the superintendent, the sleepers show no signs of movement, under a traffic of 120 trains per day, conveying passengers, coal, and goods, the express trains running at a speed of between fifty and sixty miles per hour. The drivers consider it is the best part of the line, the sensation being that of passing over a new line well made before the ballast has got hard. It is obvious that the pressure of the wheel never comes on a single sleeper, as in the ordinary system. Each

wheel in succession distributes the load over two or more sleepers, through an elastic medium, and the cross sleepers, being fast to the longitudinals, do not move at all.

Some years back a portion of the Great Western Railway was laid upon a plan which was similar in appearance, inasmuch as longitudinal and cross sleepers were used in juxtaposition; but it was not found to answer, for both were packed alike, and the rail used was the flexible bridge rail, with a continuous bearing, not in any way inducing elastic resilience. The object in using the cross sleeper was simply to form a better framing than the cross transoms abutted at their ends, but the increased difficulty in packing caused it to be abandoned.

The system on the North London Line has several obvious advantages. First, it forms a framing, the longitudinal basis keeping the cross sleepers in position, without fore and aft rolling or side movement, tending to make the line crooked. Secondly, each sleeper gets only half the work, as the load of each wheel is distributed over two or more sleepers at once. Thirdly, the rail bears through its whole length only on chairs, standing on an elastic base, and thus the elasticity is equable and continuous, and not disturbed by blows. For this reason the more firm the bearing beneath the sleepers, the better is the condition of the line.

Many superintendents have great objections to timber as a destructible material, uncertain and troublesome; and it may be objected to this system, that as the longitudinals are extra, it increases both the first cost and the cost of maintenance. Timber is no doubt destructible, with more or less rapidity, according to the conditions under which it is used. It is most destructible when it is partially buried. If quite buried in ground always moist, it is durable. If kept altogether out of the ground it is also durable, at any rate in climates like that of England.

With this system of longitudinal elastic bearers it is quite practicable to keep the timber wholly out of the ground, using as sleepers metal, or stone, not subject to rot. The cost of a first-class cross-sleeper road may be tabulated in quantities per mile, as follows :——

	Lbs.	Tons.	Cwts.		£.		£.
504 rails	at 84 per yard.	132	0	at	8	per ton	1,056
4,224 chairs	" 42 each	79	4	"	4	"	317
8,448 spikes	" 1 "	3	16	"	12	"	48
2,016 bolts	" 1½ "	1	7	"	20	"	27
1,008 fish-plates	" 22 per pair	5	0	"	9	"	45
	Tons	221	7				

	Ft.	In.	In.	In.	Ft.		
2,112 cross-sleepers	2	6 apart,	5x10x9,	at 4s.	each		424
4,224 keys				" 1½d.	"		27
							£1,944

Upon the elastic system, the sources of destruction are so far removed, that the excessive weights rendered needful by rigidity are not required; nor is it necessary to place the cross sleepers so close together: the quantities per mile will therefore stand thus:——

	Lbs.	Tons.	Cwts.		£.		£.	s.
504 rails	at 72 per yard.	113	3	at	8	per ton	905	0
3,520 chairs	" 28 each	44	0	"	4	"	176	0
7,540 spikes	" 1 "	3	3	"	12	"	37	16
2,016 bolts	" 1 "	0	18	"	20	"	18	0
1,008 fish-plates	" 22 per pair	5	0	"	9	"	45	0
	Tons	166	4					

	Ft.	In.	In.	Ft.			
1,760 cross-sleepers	3 apart,	5x10x9,	at 4s.	each			352 0
3,520 keys			" 1½d.	"			22 0
1,174 longitudinal timbers		5x10x9,	" 4s.	"			287 0
							£1,842 16

Thus it appears that the elastic system costs less than the ordinary system. Reasoning anologically, as the effect of elastic springs upon tires of Staffordshire iron is to make them more durable than the best steel, the effect of imparting elastic action to the rails should be a proportionate economy. Iron rails should become more durable than rails of steel used under the ordinary conditions. If so, and taking into account further durability gained by the adoption of the cross-framed structure, the saving in maintenance should amount to a considerable sum annually.

But longitudinal timbers out of the ground would be inadmissible in hot climates, and metal must be resorted to. Yet metal, as commonly used, is rigid, and therefore objectionable. Hence it is important to ascertain, whether it be not practicable to construct a railway which, though wholly of metal, shall be elastic. The author thinks it can be accomplished. The sleeper may be of cast iron, with flanged bearers, on the surface of the ballast, and a hollow descending keel. At the bottom of the keel, internally, may be placed plates of tempered steel, curved on the surface, to take the lower table of a double-headed rail. The edges of the steel plates resting on ledges would have a very small amount of play allowed, but sufficient to take off the jar. The rail could be kept in position at the upper part, on the inner side, by the flange of the sleeper, and on the outside by a key of metal, with a space below the upper table. The rail could be held down by a round iron pin, passing through sleeper and rail, below the bearing flanges. The section of the sleeper could be arranged that, in case of the springs breaking, the rail would directly take a bearing on the sleeper. The distance between sleeper and sleeper would be 18 inches, or two inches less than that on a cross-sleeper road, with the sleepers 2 feet 6 inches apart from centre to centre. The cost of this line would be as follows:——

	Lbs.	Tons.	Cwts.		£.	£.	s.
504 rails	65 per yard.	102	3	at	8	817	4
Ft. Ft. In.							
3,018 sleepers, 2 x 1 2	70 each	94	7	"	4	377	8
1,509 angle-tie bars	14 "	9	9	"	9	85	1
3,018 hook-head bolts	1 "	1	7	"	18	24	6
3,018 iron angle-keys	2 "	2	14	"	12	27	8
3,018 round " "	1 "	1	7	"	12	16	4
In. In. In.							
6,036 steel plates, 3 x $\frac{3}{8}$ x 6	2 "	5	8	"	25	135	0
1,008 fish-plates	22 per pair	5	0	"	9	45	0
2,016 bolts	1 each	0	18	"	18	16	4
Tons		222	13			£1,543	15

In India the traffic is not so heavy, generally, as at home, and a rail of 65 lbs. on springs would be more durable than a rail of 75 lbs. on ordinary rigid cast sleepers. The bearing area would be about 8,000 square feet per mile, and, being upon

the surface, would be packed easily and with great steadiness by reason of the base being near the rail head; and besides, the depth of the keel, together with the broad angle iron, would keep it fast down.

It may be objected, that springs are apt to break. This is quite true if the springs are not carefully made, and if subjected to the action of frost. But there is no frost in India; and if the springs do break, the rail simply rests directly on the sleepers, upon an area four times as great as that of the ordinary sleepers. This line can be arranged for extremely sharp curves.

As the result of the North London Experiment shows that timber longitudinals, for the purpose of continuous elastic action, are effective, it becomes desirable to apply them on sleepers that are permanent, which a system of iron cross sleepers, divided into two parts, and connected with short centre tie bars, would effect. The sleepers may be bolted to the longitudinals, so as to be unable to move, and, as their form may be that of a spreading trough, inverted, with a flat top, the packing would then be very easy, length-long, and the sleepers would key into the ballast, and hold the line down. Ridges cast on the sleepers would hold the timbers, with play to key them and adjust them, so as to make the gauge of the way exact. The cost of this line would be as follows:——

	Lbs.		Tons.	Cwts.		£.		£.	s.
504 rails	72	per yard	113	3	at	8	per ton	905	6
3,520 chairs	28	each	44	0	"	4	"	176	0
3,520 clips	2	"	3	3	"	12	"	37	16
1,008 fish-plates	22	per pair	5	0	"	9	"	45	0
2,016 bolts	1	each	0	18	"	20	"	18	0
3,520 cast-iron sleepers	70	"	110	0	"	4	"	440	0
	Ft.	In.	In.						
1,174 longitudinals, 9 x 5 x 10			at 4 s. each					234	16
3,520 wood keys at 1½ d. each								22	0
								£1,878	1

From which it would appear, that even with elastic longitudinals and permanent metal sleepers, this line costs rather less than the standard first-class permanent way.

It is now two years and three months since this piece of elastic way was first laid down on the North London line. It is

still in the same good condition, and has never been opened out, or packed. On the wearing-table the surface shows no distress, and scarcely any wear; while the neighboring rails on the rigid system betray the usual amount of destruction, from three to four years being the life of a double-headed rail of 82 lbs. per yard. It appears that the elasticity which is obtained, both laterally and vertically, eludes the blows of the wheels, and prevents that disintegration of the metal which takes place, under rigid action, at the imperfect welds of the ordinary iron rails. There is a remarkable confirmation of this in the fact, that the two rigidly connected ends of the rails are split in the usual manner, while on the elastic portion the same rails are undamaged. In this piece of line, the cross sleepers are three feet apart, and so remarkable has been the result, that the superintendent, Mr. Matthews, has laid down a further length on the Poplar line, with the cross sleepers six feet apart, and with two rail supports in the elastic space between. The longitudinals are four inches deep, by eleven inches wide. Theoretically, this should be a better road than a rigid one with the cross-sleepers three feet apart, for the load being distributed over two sleepers through an elastic medium, the strain will be less severe. If the result be favorable, there will be only ten loads of timber per mile beyond the ordinary cross-sleeper road.

The conclusions that the author has arrived at are,——

1st. That the chief sources of destruction in rolling stock and permanent way, apart from disproportionate weight, are blows and friction between tires and rails, producing jumping and sliding.

2nd. That the best mode of preventing the blow, is to provide for elastic resilience immediately over the tire, beneath the wheel, and immediately under the rail, taking care that the rail in itself should be as rigid as possible, while the rail-joints are elastically supported by fishes of sufficient depth. This continuous elasticity can, however, only be obtained by discontinuous supports, as with the double-headed rail on an elastic base; the flat-footed and bridge rail with continuous support are not adapted for it, but can be applied with dis-continuous supports.

The question of rail-joints is so important, that the author is desirous of making it well understood. The original fishes, which he proposed, were driven in on each side of the rail, between two chairs placed on two sleepers; the distance between the chairs being only six inches. In this mode parallel fishes might serve the purpose. But when bolted fishes were adopted, the distance between the chairs was necessarily widened to 2 feet. Under these circumstances parallel fishes were an obvious mistake; but they were persevered in, because they were easily produced by rolling. To make a joint perfect, the strength should be as great at the joint as at the intermediate portions of the rail; but, inasmuch as the rails are 5 inches in depth, and the ordinary fishes little more than $2\frac{1}{2}$ inches, theoretically the joint ought to bend, and practically it does bend, as the wheels pass over it. To compensate for want of depth, the fishes have therefore been increased in thickness, with very little advantage in point of strength, and with great disadvantage in point of manufacture, inasmuch as the greater thickness and increased size of the bolt holes causes distortion in punching, and want of true fit. The bolts have been enlarged in the hope of thereby keeping the fishes tight. Theoretically the fish fits between the rail tables as an obtuse wedge, and it is supposed to slide between the tables, and take closer contact as the bolts act. This may be the case when first applied, but after a short use, both fish and rails become indented, and the sliding power is at an end, and no amount of bolt power can then hold them tight. To remedy this evil, the first consideration is so to deepen the fishes as to give them equal strength with the solid rails at the joints; secondly, to give them fixed, and not sliding abutments against the rail tables, and to tighten them by an elastic expansion with the bolt power. The plan is shown in Plate 8, Figs. 6 and 6 A. The fishes are formed with inner ribs, which fit accurately between the rail tables. The outer fish on the top rises to the level of the rail and descends below it, giving a greater depth. The inner fish fits under the upper table and descends below the lower table. In order to apply the strength only where wanted, the fishes are tapered in depth towards the ends, and they are arched laterally, so that they expand in the channels with elastic pressure by the power of the bolts, and the bolts are kept tight by this elastic action and may be made smaller.

It is obvious that no distortion of form will take place in punching; and there is another advantage in great additional lateral strength, by the lateral projection of the fishes.

3rd. That the sliding, or frictional movement of the tires on the rails can only be completely guarded against, by permitting each wheel to revolve separately, or by permitting the tires to slip on the wheels, and at the same time providing for end play of the axles between the rails, in such a mode that the rails may govern the flanges, and keep the several axles at right angles to the rail, whether on straight lines or on curves.

4th. That the sleepers, or foundations of the permanent way, cannot be too firmly or too rigidly bedded, and that durable iron, or stone blocks, as in the original system, may be advantageously substituted for timber, if elastic resilience be provided.

After many trials, the best arrangement for the spring tires has been found to be, a spring tapered in width from the edges, increasing to the centre, the wheel being a true cylinder on the edge, and the tire corresponding to it, with a broad groove below, as shown in Plate 8, Fig. 5. The wheel is thus easily applied. It should be understood, that the elastic action both in the wheels and the rails increases in importance with the speed; but wherever curves exist, it is of great importance that the revolutions of the tires should correspond to the length of the rail. Plate 8, Fig. 4, shows a plan in which a plain steel band is interposed between the wheel and the tire, suffering the wheel to slip round in the band, or the tire to slip around on the band. This is the equivalent of a loose wheel with cheap and simple structure, compensating on curves.

When speeds are not excessive, rigid way may be constructed; but in such cases it is essential to have as nearly as possible a continuous bearing for the rail. A simple plan for this purpose is shown at Plate 8, Figs. 7 and 7 A. A series of cast-iron troughs, with broad flanges, bearing on the surface of the ballast, are spaced at distances of three feet apart from centre to centre. In the troughs are placed single-headed rails, keyed down by round pins, two to each sleeper, the

sleepers being each two feet long. They are connected from side to side by tie-bars, which keep the exact gauge. There is no timber in the whole structure, and the weight of metal in a mile is under 180 tons, as follows :——

	Tons.	Cwt.
3,520 yards of rail, 21 feet long, 45 lbs. per yard	70	14
3,520 sleepers, 2 " " 60 " each	94	6
1,760 tie-bars, 4 ft. 8½ in., 14 " "	11	0
8,048 round keys, 1 " ⅝ " "	2	14
3,520 hook-head bolts, 10 oz.	1	0
	179	14

No fishes are required, the ends of the rails being secured in the joint sleepers by four keys of round iron. This line, in conjunction with revolving tires, would be very effective for moderate speeds, and it is well adapted to lay down, especially for sharp curves.

The trials made have been quite satisfactory.

The Paper is illustrated by a series of diagrams, from which plate 8 has been compiled.

Mr. C. H. Gregory, V. P., said he had listened with much interest to the two papers before them, and not with any the less interest because the invention brought under their notice emanated from a gentleman whom he had known for twenty-five years as having devoted himself earnestly and honestly to railway improvements. He believed that Mr. Adams's labours had been of great value to the railway world, and the merit of one of his former inventions, the fish-joint, was now universally admitted.

With regard to the introduction of a spring between the tires and the frames of wheels, the facts brought before them seemed conclusive, as to the diminution in the wear of tires, effected by the introduction of the spring between the tire and the body of the wheel; and he should watch with interest the further use of the spring, which would show whether its advantages were counterbalanced by any evil which had not yet become apparent. Hitherto a loose tire had habitually been looked upon as an element of danger; it was true, that evil had generally been associated with a defective mode of fastening, and therefore it was possible that the loose tire coupled with a good fastening might not be objectionable.

He considered the radial axle, when properly applied to locomotive engines, to be a very valuable invention, which might be adopted without any fear; and this conclusion was formed not merely from an inspection of the drawings, but after carefully watching the working of an engine fitted with the radiating axle-boxes.

A long wheel-base had been found of advantage in affording capacity for large engine power; but that advantage had been hitherto diminished more or less by the retarding effect of friction. Length of wheel-base, while giving increased steadiness when running at high speeds on a straight line, involved so much friction on curves as practically to prevent the introduction of engines with long wheel-bases on railways with very sharp curves, where the existence of steep gradients might make powerful engines especially necessary. It had been the custom to consider, that the cone of the wheels gave them freedom of action in going round curves. He believed that view was a fallacy so long as the axles were rigidly parallel. He had seen this fallacy demonstrated with a model carriage, having two pairs of wheels fixed on parallel axles, the diameters of the wheels on one side of the carriage being less than those on the other side. This model carriage being placed on a board, and one end of the board lifted until gravity caused the carriage to run down, it was found that the carriage ran straight and not, as might have been expected, in a curve. In fact, so long as the axles were rigidly parallel, that parallelism of the axles would lead to a tendency to run in a straight direction, and the cone of the wheels was of no service in helping an engine round a curve. In order to make the cone of service for such a purpose, the axles must be made to radiate.

He thought this plan of Mr. Adams's, when applied to an engine, attained this object more satisfactorily than any other method he had seen. The bogie frame, so successfully adopted in America (from the suggestion, he believed, originally of Mr. Robert Stephenson), and which had been adopted with advantage on many railways in England, to a certain extent obviated the evil arising on curves from rigidly parallel axles, when used with a long wheel base; but at the same time the partial radiation of the bogie depended upon flange action, and the engine being supported on the bogie, through a centre pin, there was not the same lateral steadiness of the ends of the

engine which could be attained by a system in which the weight of the engine was supported through the side-frames on the ends of the axles, as in the engine under consideration.

Again, another advantage of the radiating axles as compared with the bogie, was its greater simplicity, and its smaller weight and smaller cost. The expense of the bogie had, in some cases within his knowledge, prevented its adoption, while the cost of the radial axle-box was comparatively small.

He had attended the trials of the "White Raven," fitted with Adams's radial axle-boxes, on the North London Railway, and rode on the engine and watched the working of the axles with great care for some time. During a portion of that time they ran upon very sharp curves, and at high speed, very nearly if not quite 60 miles an hour. The motion going round curves was extremely easy. There was none of the grinding that would have taken place with an ordinary engine having a wheel-base 22 feet long, not fitted with some compensating arrangement; still less was there anything like a blow; and he was led to believe, from subsequent examination of the flanges of the wheels, that they had very little work to do, but that generally the cone of the wheels came into action and brought the axles into their proper position. After the trial had been completed, he observed that the dirt was only just rubbed off the flanges of the wheels, and there was no appearance of anything like severe friction. He had anticipated that, while working well on curves, there might be a tendency for the wheels to run wild on straight lines; but in practice he had not observed any such tendency, and he believed that the engine would run steadily and safely at high speeds on straight lines as well as on curves. When running at high speed on staight lines, he had watched the working of the axle-boxes from the side of the engine, and the only time when he saw a slight motion in the boxes was when they came to a crook, to which the wheels instantly and easily adapted themselves, without any motion being felt on the engine.

Having mentioned these practical results, he would only add, that he considered this invention would turn out to the advantage of those railway companies who adopted it.

In reply to an inquiry, Mr. Gregory stated that he thought that the radii of the curves through which they ran at high

speeds, were about 20 chains; but some of those through which they ran at moderate speeds were very much smaller. The speed on some parts of the line was about 60 miles an hour.

Mr. VIGNOLES was happy in being able to corroborate, in almost every respect, what had been stated in commendation of the improvements which constituted the subject of the paper; and the more so, because he thought the railway world was deeply indebted to Mr. Adams for a great number of valuable inventions, of which the public had had the advantage, but which had not always resulted in equal benefit to the author. He was glad to see that the most useful, practical, and simple invention of the radial axle-box had been brought into use, and he hoped to learn that it was becoming extensively adopted.

He was present at the trial just spoken of, and could state his full conviction, that the action of the machinery realised even more than could have been expected; and he was quite satisfied, that there was no recent improvement in locomotives which was likely to be more beneficial than this one, particularly upon the modern system of adopting very sharp curves. With respect to the supposition, that the cone of the wheel was of service in going round a curve, he was convinced that it was quite a fallacy, and that the cone, in its simple form, was only a counteraction of the oscillating motion in an engine, when moving in a straight-forward direction, and that its tendency was simply to throw the flange of the wheel from off the rail. He believed that all practical men were agreed as to that point. He was also of opinion, that the application of the radial principle would, in some respects, bring the cone into play, by throwing it through gravity into that particular action for which it was most suited.

With respect to the bogie, as originally applied in America, it was a useful invention; but his practice had proved to him, that the single bogie was even more efficient than the double bogie. The combination of the radial axle with the single bogie had been peculiarly happy. He had employed the bogie principle exclusively on various large railways, and in some instances in Spain, and he considered that principle of central motion, if he might so express it, which was due to the bogie, had been simplified, and even brought to perfection,

by the mode in which the radial axle-box had been so practically and so successfully applied.

Mr. G. H. PHIPPSS said, he had not the pleasure of being on the engine when the recent experimental trip was made, but he thought the invention ought to be yet further considered and tested before finally adopting it. When an engine fitted with the radial axle-boxes oscillated on a straight line, whatever the amount of motion might be, it would slew the axle round as much as the same amount of "end on" motion of the axle would do when the engine was working on a curve; he conceived that this slewing of the axle on a portion of the straight line of a railway might be dangerous, and might give the flange of a wheel a tendency to mount upon the rail, particularly if the oscillation happened opposite a bad joint, or other defect on the inner edge of the rail.

He thought very well of the general principle of the radial axle-box, and he had for a long time given much attention to the same subject; but he confessed he thought some modification was still required to make it perfect. His idea pointed to something in the nature of a spring, placed at right angles to the axle, and pressing against collars upon it whenever the axle underwent any "end on" motion; then, if a sudden blow, lasting only for a very short time, were given to the axle, it would simply move "end on" without slewing; but if the acting course were constant in its action, as for instance, the pressure of the rail against the flange of the wheel on a curve, then the axle would slew as desired.

He would remark, in reference to the difficulty of regulating the proper elevation of the outer rail, when curves occurred without the intervention between them of a portion of straight line, that Mr. Robert Stephenson had frequently suggested to him, that the raising of the outer rail was not intended merely as a means of meeting the centrifugal force, but also to throw the centre of gravity of the engine nearer to the inner rail. In a curve of 500 feet radius, at 10 miles per hour, the requisite elevation to correspond with the centrifugal force would be 2 inches. It might be worth while to inquire, what the effect would be if the elevation were made as much as 6 inches instead of 2 inches? In such case, on a base of 4 feet 8½ inches, the centre of gravity of the engine would be thrown over nearly a like quantity of 6 inches towards the inner rail; con-

sequently the outer rail would be relieved of considerable pressure, and the wheel would thus have a better opportunity of going round the curve without much friction. Therefore he threw out the suggestion, whether a greater elevation than was due to the centrifugal force might not be a useful thing.

Mr. VIGNOLES said, with respect to reversed curves, there was no regulation in this country, but on the Continent—in France, Germany, and Spain—there was an established rule, for the purpose of avoiding the grinding action to which reference had been made; it was that there should always be a straight interval of 100 metres between the termination of one curve and the commencement of another proceeding in an opposite direction. He could not say he assented to the law, which was simply empyrical; he had drawn attention to the fact merely to show, that it was a subject which had not escaped notice in other countries. With respect to the elevation of the outer rail, it was well known that the velocity with which a train passed formed a very material element in determining what should be the amount of that elevation. At the same time, he agreed it was better to give a little extra tilt to the rail to obtain the additional facilities which had been alluded to.

Mr. SCOTT RUSSELL said, there was one point which he particularly recommended for consideration:—the interposition of a piece of straight line between two reversed curves had been mentioned as having had the sanction of engineers on the continent, but it was a clumsy expedient, and not a solution of the difficulty which had been brought forward. He was, however, glad that the law in question had been alluded to as empyrical, and not recommended for adoption. The real fact was, if two reversed curves met, it was generally because there was no possibility of the intervention of a straight piece. He had had experience in the effect of running straight lines into canted curves, and he found that the result of introducing a straight piece into a canted curve without the addition of other precautions, was the creation of the very evil it was intended to avoid, and on passing from a sharp curve to a straight line, the same difficulty occurred.

As an indication of the direction which the researches should take, he would point out that if this question were examined carefully, there would be found a mode of passing from one

sharp curve into another of equal flexure, by means of such gradually diminishing curvature, that the wheels of both engines and trains might go round reversed curves without grinding on either rail. He thought it was a pity to bring over-refinement into this question, and the only practical solution he knew of, was slightly to cant the straight line before entering on the curve, and slightly to diminish the cant of the curve before entering the straight line. The next point had been well put, but not quite solved. It was, that for every speed there was a different cant. It appeared to him that the solution of the question was to take the extreme speed for the measure of the cant; and then, probably, in the intermediate speeds would be found exactly the required medium. He recommended the whole of this subject as a field in which the mechanical and mathematical powers of the younger members of the institution could be exercised with advantage.

Mr. G. W. HEMANS remarked, that the attempt to equilibrate the motion of a train on a curve by raising the outer rail had always been carried as far as it was considered safe to do it. He had been obliged to ascertain what could be got out of that mode of equalizing the motion of a train, and he believed no improvement could be found in that direction. He knew instances in which the outer curve had been raised so much, that the inner rail had borne nearly the whole weight of the train, and yet without preventing the flanges grinding upon the inner edge of the outer rail. That elevation had been carried to 6 inches or 7 inches round sharp curves, and with no good results. If any advantage was to be obtained in that respect, it would be from some invention like that of the radial axle-box, which appeared to be one of great merit. At the same time, he concurred in thinking it required to be watched with care, as to its perfect suitability for all speeds, and for going round all curves.

With regard to the permanent way under discussion, he had always had great regard for the ingenuity of the author of it, and had gone to some expense in trying his inventions, and sometimes when no beneficial result had been apparent. He had tried permanent way on wrought-iron longitudinal sleepers, on cross-sleepers, on flat-footed rails, bridge rails, and rails upon chairs; but he was sorry he could not quite concur in the results finally deduced, as to the system of permanent way then

brought before the Institution being the best. The author considered the best thing would be, the double-headed rail placed on fixed supports or chairs, and that those should be fixed on longitudinal sleepers and be confined by a bridle or stirrup to the longitudinals, and that the longitudinals again should be fastened upon cross-sleepers.

That was a kind of permanent way Mr. Hemans had tried to some extent, and he might point out some serious defects in it. The principal one was the great cost, and the necessity of covering the whole of the timber, of unusual thickness, with ballast; for the upper timbers, when left uncovered, decayed so rapidly, through the alterations of wet and dry, and heat and cold, that he was obliged to abandon the system. He thought Mr. Adams had failed to obtain what he wanted, viz., a rigid rail, but an elastic substratum. He believed, if a longitudinal bearing were used, covered by a rail directly secured, so as to obviate the necessity for the intervening chair or other support, there would be elasticity enough for the purposes required. He for one thought it was high time to have something better than the double-headed rail, in a cast-iron chair, nominally fastened with wooden keys and pins which did but little good, and which were frequently held in their places only by the pressure of the ballast round them. He believed the flat-footed rail, on continuous, or even on cross bearers of timber, with a base of not less than five inches, and with a good fish joint, was better than the double-headed rail which ought never to be turned, and which he thought should be dispensed with altogether.

Mr. W. H. Barlow thought the remarks as to the usual mode of constructing a permanent way were rather severe. After many years' experience, that system had been adopted throughout the country; and, although he assented to some of the objections, he thought there were certain advantages connected with the double-headed rail which could not be got in any other way. One advantage was, its perfect symmetry and its tendency to keep straight. That symmetry he regarded as an important condition, because, if a rail in cooling became twisted, no mechanical process could make it straight again. Though concurring as to the merits of the elastic road, he could not admit its claims to novelty; in principle it was almost identical with a portion of the road

used on the Manchester and Birmingham Railway in the year 1840, and designed by Mr. Buck, the engineer of that line. An experiment of having the wheels of a carriage on one side larger than those on the other had been referred to. He had seen that plan tried; and he agreed in what had been said upon it. The normal motion of the carriage was in a perfectly straight line, when the axles were parallel; but when the axles were not parallel, the result in every case was, that the carriage moved round in a curve, the centre of which coincided with the point of intersection of the converging lines of the axles produced.

Mr. GEORGE BERKLEY said, the results of the experiments with the radial engine had been fully stated, and were very satisfactory. The trial of the engine was, however, merely an experiment. Inventions such as that under discussion required much consideration before engineers could adopt them with confidence. This engine, from its construction (having inside cylinders, and all the parts well balanced), had not much tendency to oscillate. Its steady running, therefore, furnished no sufficient guarantee that engines of this description, with outside cylinders, not so well balanced and more worn, would run steadily at great speed. On curved lines, where the speed would not be great, this construction of engine appeared to present an opportunity of saving the wear and tear of the tires and rails. He thought the invention exceedingly ingenious.

Mr. GREGORY, V. P., wished to explain, that the lateral oscillation was not so free as Mr. Phipps supposed, because the weight of the engine being borne directly upon the axle-boxes, by means of sliders, the friction due to that weight had to be overcome before the axles would vibrate so as to lose their parallelism; and owing to the cone of the wheels the weight of the engine tended to keep the axles in their proper position. He might add that he could not agree in one conclusion drawn by Mr. Hemans. He could not understand how, unless there was an undue raising of the outer rail, there could, in the ordinary working of curves, be any greater amount of weight on the inner rail than on the outer rail. It seemed to him that when trains were running round curves the result of the combined forces of gravity and centrifugal action would be to produce equal weights upon the two rails.

Mr. PHIPPS remarked that he had most distinctly said, when the elevation due to centrifugal force was given, the pressure on the two rails was exactly equal. The suggestion he had offered was to give more elevation than that.

On the subject of spring-tires, he thought that, like experiments on ships, it was a most important thing so to manage the experiment as to illustrate, as far as possible, only one fact at a time. This intervention of the spring-tire gave the wheels the power of turning round, to some extent, independently of each other, thus acting somewhat similarly to a friction clutch; but suppose such a friction clutch were applied without any spring tire at all, how far would, or would not, the power thus given the wheels of turning independently of each other, favour their motion in going round a curve. Experience showed it would not do to detach the wheels entirely from each other, because then the engine could not be kept square to itself on a straight line.

Owing to the joint effect which the tires under discussion possessed, partly of acting as springs, and partly as friction clutches, he was afraid that no direct conclusion could be come to, as to the proportion of the advantage said to be gained by these tires, which should be assigned to either of the above properties.

Mr. HEMANS was at a loss to understand how, if the centre of gravity was thrown more on one wheel than another, that wheel did not bear more weight; and he would invite attention to the fact, that the inner rail on a curve was generally worn down, while the outer one was comparatively unhurt.

Mr. E. WOODS said, with regard to raising the outer rail of the curve, that no doubt the elevation of the outer above the inner rail was that which, in ordinary circumstances, contributed to neutralize the tangential force. By raising the outer rail the engine was placed transversely on an inclined plane, and this brought the force of gravity to bear in counteracting the tangential force of the train. In ordinary engines, such as were furnished with axles running in rigid frames, that was the only way of resisting the tangential force. But in another class of engines, in which a special provision was made for accommodating the position of the wheels to the curvature of the road, such as the modification of the truck supporting the front end of the engine, known as the "Bissell truck," a fur-

ther principle was brought into play. This, had been introduced on American railways, and also in Chile, by himself, and in Spain by Mr. Vignoles. The element brought into operation by this form of truck was the weight of the engine upon its frame; for instead of the engine resting upon the truck and swivelling upon a fixed pin and plate, it rested upon a moveable plate, or block, which was permitted the power of transverse motion, moving upon two pairs of inclined planes, which inclined upwards, from the centre towards either side, so that when the engine was going round a curve, the body was lifted up on the frame itself, in proportion to the extent of the deviation of the curve from its tangent. By that means the weight of the engine tended to force the wheels into true position, irrespective of the elevation of the outer rail. Mr. T. E. HARRISON thought the degree of elevation to be given to the outer rail was pretty well understood. It was not merely a question of giving a calculated amount of cant to the rail,—one element was the speed at which the engine travelled,—and he would say, that in cases where it was calculated that it would be necessary to raise the rail to the extent of 6 inches or 7 inches a speed was implied which no one should adopt round such a curve. He thought, in practice, nothing facilitated the passage of an engine round sharp curves more than giving a little additional width to the gauge of the rails at such parts of the line; and if it were assumed to be necessary for trains to travel at a high speed round sharp curves, then he thought, it was necessary at once to adopt such a plan as that of the ordinary bogie engine, or that recommended in the papers. He looked with the highest respect upon everything that came from the author of that plan; for in all matters of permanent way, a great amount of valuable improvement was due to the constant attention which he, for the last thirty-five years, had given to the subject.

Mr. J. M. HEPPEL was present at the experiments with the radial engine, but the results had already been so well explained that he had little to add. He would say in all his experience he never rode on an engine which ran at such speed so steadily and so well. With reference to radiating axles, in contradistinction to the ordinary bogie frame, he might remark that in going round a curve there were two desiderata—one was, that the centres between the two wheels should be

brought to coincide with the centre line of the curve; and the other, that the axles should be brought into the direction of normals to the curve. The ordinary bogie frame, as usually applied to locomotive engines, attained the latter of these two objects imperfectly, and the former not at all.

In the engine in question, by the proper choice of the centres from which the circular slots in which the axle-boxes slid were struck, a motion was obtained whereby both the objects he had referred to were completely accomplished. The leading axle not only placed itself normal to the curve, but at the same time brought its middle point truly over the centre line of the rails. He thought it might reasonably be anticipated, that great ease in passing round curves would result from such an arrangement; and he was happy to add testimony to the satisfactory manner in which this expectation had been verified by the experiments he had witnessed.

Mr. HAWKSHAW, Past-President, said, he could not concur in some of the observations which had been made in the course of the discussion. He did not agree in the opinion that it was the same thing to pass from a curve to a straight line, and to pass from one curve to another reversed curve. The angle of motion in the latter case must be greater, and the centre of gravity would have to be shifted double the distance. Neither did he think there was no advantage in giving a cone to the wheels of a locomotive engine. He concurred in the observations based upon the supposition, that the axles were always parallel to each other; but that supposition was not quite accurate. The fact was, the object in giving a cone to the wheels of a locomotive was this; when the engine was driven by centrifugal force on to the outer rail, the wheels ran with a larger diameter on the outer rail and a smaller diameter on the inner rail, and therefore the wheels formed the frustrum of a cone. Of course that could not take place without the parallelism of the axles being disturbed. In fact, there was motion enough in the axle-boxes of all locomotive engines to admit of sufficient motion to change the parallelism of the axles so as to coincide nearly, though not quite accurately, with what was necessary. The moment the wheels formed the frustrum of a cone, the axles had to change their direction, to some extent: therefore there was an advantage in giving a considerable cone to the wheels of locomotives and other vehicles.

He did not agree in the remark that, up to the present time, a good permanent way could not be made, or that the plan had yet to be discovered of making one. He believed any one could make a good permanent way, if sufficient money could be spent upon it. The defects of the permanent way consisted mainly in the fact, that efforts were always being made to form it too economically. Any one of experience could make a much better permanent way if he felt he might incur a greater expenditure, and the defects arose more from the attempt to make and to maintain permanent ways too economically than from any want of knowledge.

With reference to the capacity of engines for passing round curves, he had recently had an opportunity of inspecting the improvements contemplated by Mr. Adams, and of riding upon the engine described in Mr. Cross's paper, from Bow to Camden Town. It was no doubt important that something should be done to enable locomotive engines to pass round quick curves without those jerks and jumps which sometimes took place in the ordinary class of engines. That had been done, to a considerable extent, by what was called the bogie; but that plan took up a great deal of room, and, in some cases, interfered with space which could be better applied to other purposes. He thought Mr. Adams' engine possessed many elements of usefulness, which, with a little more care and elaboration, might prove advantageous where locomotive power was applied to pass round quick curves; and, as far as he could at present judge, it did not seem liable to get out of order.

Mr. William Adams said, as engineer of the North London Railway, he might be expected to give some particulars of the trial in question. He could not say precisely what the speed was, but, as far as he could judge, the down journey was made at the rate of about 50 miles per hour, and the return journey at rather more than 60 miles per hour. That was near the Edgeware Road. One object of the high speed was to test Clark's continuous break, which was applied to the train. The engine had been on the North London line for experimental purposes for a week, and he had run several trips with it, going round sharp curves at high speeds to test its steadiness. The engine had gone round a curve of two chains radius at Poplar without showing any tendency to mount the rails, but that was at a slow speed. Curves of 20 chains radius had been gone through

at the rate of about 35 miles per hour; but it was contrary to custom to pass curves at high speed. He had lately been to St. Helen's to test an engine of that kind on the line for which it was designed. He took a coal-train about seven miles, and on that day some part of the road was in bad order for want of packing; the oscillation of the coal trucks was remarkable. At a speed of 40 miles it was so excessive that the steam had to be shut off, but the engine was perfectly steady. He had been much surprised by the absence of slipping in the St. Helen's engine, and he thought that absence of slipping was to be accounted for by the spring tires. There was a considerable difference in that respect between the St. Helen's engine and any other.

Mr. JAMES CROSS, in reply, said the only point which called for notice was an erroneous impression that the St. Helen's engine had been merely constructed for the purposes of experiment, whereas the fact was, it had been running regularly for six months, and came straight off work to London for the purpose of being exhibited to the engineers of the metropolis. Having had the engine under his notice for six months, he believed, however perfect it was in going round curves, it was still more so on straight lines. He knew no engine that ran so steadily on a straight line.

Mr. W. B. ADAMS said, that the radial engine ought now hardly to be considered an experiment, strickly speaking, because it had been in use a considerable time; but whatever merit there might be in the engine, he was indebted to Mr. Cross for the opportunity of working out his idea. [1]

In his opinion, the adhesion which had been referred to was attributable to the elastic action of the tire: there was a certain amount of flattening of the tire upon the rail. There was another fact, that the wheel could slip round within the tire instead of the tire slipping on the rail, which compensated for any unequal diameters in the four coupled wheels, and prevented the grinding which usually took place in coupled wheels. A horizontal rocking action of the tire also took place and prevented the flange from being worn. Flange wear was usually

[1] The subsequent daily use of the radial engines on the Great Northern, the London, Chatham, and Dover, and other lines, is conclusive as to lengthened experience. It is perfectly practicable for these engines to carry 2,500 gallons of water, adapting them for express trains. W. B. A.

the result of a shearing action, and that could not take place without a rigid bearing against the rail.

With regard to the radiation of the axles, it was evident that the lateral unsteadiness of an engine must be due to the fact, that the flange of the tire was a rigid body which, in impinging upon the rail, caused the engine to sway laterally, and the wheel occasionally to mount the rail. With the wheel so constructed that it could easily get out of the way, the rigid impinging did not take place; for before the flange of the tire came in contact with the rail the cone of the wheels came into action, and the flange was fended off from the rail precisely like the steam-boats at the river piers. He believed that Staffordshire tires, which were those used, would stand double the wear of Krupp's tires.

As to the portion of the permanent way of the Manchester and Birmingham line, which had been alluded to, he had no doubt that Mr. Buck was capable of inventing that or any other thing that was required for a railway; but it was quite certain that the idea of the permanent way, which was the subject of the paper, was not taken from the Manchester and Birmingham Railway. In fact, Mr. Adams had never heard of it. Mr. Buck's plan appeared to have been an experiment for a special purpose, and never published. Apart from that question, the motive of Mr. Adams for it was this:—Having succeeded in producing from iron tires a greater result than was produced from steel, he argued that the true system for rails was analogous to that for the tire, and that the destruction could only take place by the blow, or friction between the tire and the rail; and he argued, that if he could get elasticity he would avoid that destruction. At his instance, Mr. Chubb, of the North London Company, caused longitudinal sleepers to be fastened on ordinary cross-sleepers, packing the cross-sleeper, but not packing the longitudinals. The practical result of this, he thought he might state, had been, that whereas the life of the rails on the North London Line was three years, these rails of the ordinary iron stock had now been down two years and four months, and showed no signs of wear whatever, except a polish on the surface—no blow, no scaling, no indent, except at the junctions, where two end rails were split from being rigidly connected by chairs of the ordinary class. There had been no packing. Those rails had never been opened

since the time of laying them down, and that was in wet weather. One cause of the duration appeared to be due to this fact, that whereas, in ordinary rails the pressure came direct upon the rigid body of the rail, without any elastic medium between, in this case there was no rigid part whatever, but one continuous elasticity from end to end. There was no rigid part on which a blow could be struck. Mr. Matthews, the superintendent of the North London Line, had laid a piece of that line on the Poplar branch, the cross sleepers being overlaid with longitudinals 11 inches by 4 inches, and with two bracket supports between the cross-sleepers. The quantity of timber used in that way was not more than the ordinary amount, and it appeared to answer very well, and the elasticity appeared to have prevented destruction.[1]

The chief difference between steel and iron rails consisted in the fact that steel was homogeneous—there was no grain in it. Iron rails were made of bars of iron, welded in an imperfect manner, and the effect of a blow upon the two materials was very different. In the one case there were fibres, as in a piece of wood, while the other was quite homogenous. The iron itself was probably harder in texture than the steel rails, and the latter, in some cases, were indented by the chairs more than the iron. In point of duration steel rails would last longer than iron, simply in virtue of being homogeneous, and consequently better able to resist heavy blows. There was the fact that rails which ordinarily wore out in three years had not, after two years and four months, shown any signs of wear; the reason was that, by the elastic yielding the force of blows

[1] On the 25th of May, 1865, Mr. Matthews, the Superintendent of Permanent Ways, writes thus: "Seven of the 'Sandwich' rails supplied by the Bombay and Baroda Railway Company were laid on the 30th November, 1859, four lengths of which are still in use (5½ years). The elastic way, with sleepers 3 feet apart, was laid in the month of January, 1862 (3 years 4 months), and the piece with the sleepers six feet apart was laid in the month of April 1864 (1 year 1 month). This last piece gave some remarkable results in the joints, which were badly fitted brackets, 9 inches long, with only one bolt in each rail, consequently working as loose as an old-fashioned joint chair; but the elasticity had prevented any abrasion of the rail-ends."—W. B. A.

was diminished more than one half, being distributed over two or more sleepers, instead of being confined to one.[1]

In reply to questions, Mr. Adams stated, that on his system the chairs were three feet apart; that the cross-sleepers were simply a support, like the piers of a bridge, and were best adapted to their purpose when most unyielding. He thought if the supports were perfectly rigid, having elasticity above them, it would be competent to make the whole of the substructure in the same way perfectly rigid, and ordinary ballast might be dispensed with, by substituting surface drainage under the longitudinals and between the cross sleepers. In the case of longitudinal sleepers, and in the ordinary way, no elasticity proper was obtained when put upon ballast, but simply a more elastic yielding, which was due to whatever compression there was in the wood. He had seen rails enter into the timber to the depth of an inch, which could only be accounted for by the yielding of the iron and the compression of the timber. In this case nothing of that action appeared to take place. Mr. Adams did not doubt, that with rigidly fixed cross-sleepers, and in the absence of blows, the ordinary packing might, in almost all cases, be dispensed with. The ballast was laid up level to the longitudinals, but not supporting them, or preventing their elastic action. It was laid on a part of the line over which 120 trains a days passed. He would prefer to have the longitudinals entirely in the free air above the surface. As regarded liability to get out of gauge, his system of permanent way was less liable to that defect than the ordinary road, because no single cross-sleeper could travel laterally without its neighbors.

Mr. BIDDER, Past President, said, the time had arrived when the Institution should address itself to the question of locomotive power and economy. A paper, commencing with the powers and performances of the earliest locomotive engines, dating from those tried in the competitive contest on the Manchester and Liverpool line, and tracing down to the present time, the power such engines possessed, and the economy

[1] No doubt what are called steel rails will ultimately displace iron rails, being a less costly manufacture and more durable; but if really steel, that is, containing the quantity of carbon constituting steel, they must either be hardened or tempered, or annealed to softness. Steel varying in hardness and softness in rails is a very treacherous material.—W. B. A.

with which such power was applied, would be of great interest to himself and of real use to the profession. He belived it would elicit a discussion of great animation and value. As far as his own investigations had gone, he had arrived at this conclusion—that the present locomotive engine had nearly four or five times the power of those with which the Manchester and Liverpool Railway was initiated. He believed that that enormous increase of power was worked, mile for mile, at less than half the cost of the earlier engines, and even taking the date of the opening of the London and Birmingham Railway, the engines now possessed six times the power, and were working at less than half the cost of the engines of that period. He could not help thinkiug this was a subject more particularly belonging to this institution and one which ought to be thoroughly investigated and exhausted; and he hoped that on the list of premiums next year, the subject of the gradual extension of the powers of the locomotive, the improvements which had been carried on from year to year, and which were still in progress, would be included. At all events, a record of that kind ought to be placed in the archives of the Institution, and he was sure its resources could not be better applied than by inviting a paper on such a subject. He was glad the subject had been opened by the papers last read. He had not inspected the radial engine himself, but he had received a very favorable report of it.

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No. 8979.

The United States of America.

To all to whom these Letters Patent shall come:

WHEREAS Nehemiah Hodge, of North Adams, Mass., has alleged that he has invented a new and useful improvement in railroad car wheels, which he states has not been known or used before his application; has made oath that he is a citizen of the United States; that he does verily believe that he is the original and first inventor or discoverer of the said improvement, and that the same hath not, to the best of his knowledge and belief, been previously known or used; has paid into the treasury of the United States the sum of thirty dollars, and presented a petition to the Commissioner of Patents, signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose;

These are therefore to grant, according to law, to the said Nehemiah Hodge, his heirs, administrators, or assigns, for the term of fourteen years from the first day of June, one thousand eight hundred and fifty-two, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, a description whereof is given in the words of the said Hodge in the schedule hereunto annexed, and is made part of these presents.

In testimony whereof, I have caused these letters to be made patent, and the seal of the Patent Office has been hereunto affixed.

Given under my hand at the city of Washington, this first day of June, in the year of our Lord one thousand eight hundred and fifty-two, and of the Independence of the United States of America the seventy-sixth.

[L. S.] ALEX. H. H. STUART,
Secretary of the Interior.

Countersigned and sealed with the seal of the Patent Office.

THOS. EWBANK,
Commissioner of Patents.

The schedule referred to in these letters patent and making part of the same.

To all whom it may concern:

Be it known that I, Nehemiah Hodge, of North Adams, in the county of Berkshire and State of Massachusetts, have invented certain new and useful improvements in railroad car wheels, and I do hereby declare the following to be a full, clear, and exact description of the same, reference being had to the accompanying drawings making a part thereof, in which

Figures 1 and 2 represent views of the opposite sides of one of my wheels.

Figure 3 represents a section through the centre thereof.

Figure 4 represents a perspective view of one of the segments and keys, detached, and which secures the whole together.

Figures 5, 6, 7, and 8, respectively, represent similar views of a modification of my general plan.

Similar letters in the several figures represent the same parts.

The general principle of connecting the tread or rim of a car wheel to the hub or central part thereof by means of India-rubber, or other analogous elastic material, such elastic material being connected with the outer periphery of the central part of the wheel by a groove on the latter, or its equivalent, and to the inner periphery of the rim, also by a groove thereon, or its equivalent, the India-rubber holding itself in both grooves by its elasticity, and giving to the wheel lateral as well as radial elasticity, is fully set forth and claimed in the patent granted to me on the 18th day of November, A. D. 1851, and need not again, except so far as to show how this principle may be modified without virtually changing it, be described. My present invention relates more particularly to the manner of constructing the segmental ring and keys for the purpose of facilitating the insertion of the ring or band of India-rubber, or other analogous elastic material, and of confining said segmental metallic ring in its place, as the means of fastening and holding the wheel firmly together.

To enable others skilled in the art to make and use my invention, I will proceed to describe the same with reference to the drawings which fully represent the same.

The central portion A is provided with a hub, as in the usual construction of car wheels, to connect it with the axle, and its outer periphery may have a groove formed therein, as seen in section at figure 7, or it may have a plain surface, as seen in the section at figure 3, for the reception of the band of India-rubber, or other equally elastic material B. In the latter case the groove, as it were, instead of being on the periphery of the said central portion, is formed in the India-rubber or other material itself, and which latter plan may be found preferable. The India-rubber ring may be formed in segments if found advantageous, but no objection has as yet been found to the using of it in one piece. The India-rubber ring is surrounded by a *metallic ring C in segments*, with *keys D* interposed between the ends of each of the segments, *so as to form a full circle*, and so that when in place the whole will be firmly held together. The rim B is constructed with a flange on one of its sides, as in the usual form for guiding it on the track, and on the other side may be cast a reversed flange F, figure 3, between which and the side of the central portion of the wheel the India-rubber is interposed, so as to take the lateral pressure between the face of the said central portion A and the said flange F. The pressure on the opposite side coming on the India-rubber between the opposite face and the flanges G, on the keys D, and the flanges J, on the segments C. The difference between this arrangement and that which was secured to me by letters patent aforesaid, or that shown in figure 7 of the drawings, is not in the principle, but a transposition of the groove from the metal to the rubber, and the taking of the lateral elasticity upon the faces of the central portion of the wheel instead of the sides of the groove, and which cheapens and simplifies the construction and still retains the solidity of the wheel.

When the wheels are constructed as represented in figures 1, 2, 3, the lugs or projections H H, &c., corresponding in number with the number of keys or segments to be used, are cast solid upon the face of the rim, and are made to project slightly over the inner periphery of said rim, so that the keys when in place shall catch underneath said projections or lugs,

which, together with the radial elasticity of the India-rubber bands, holds them firmly in place.

Figures 5, 6, and 7 represent a modification of the above-described plan, where the projections, instead of being cast with or forming a part of the rim, are formed on the end of the key, as shown at *a*, figures 7, 8, in which latter case the keys pass entirely through the wheel, and said projections catch over the rim or outer portion of the wheel, as also the projections on the other ends of the key on the opposite side thereof. In the first plan, which I prefer on account of the simplicity of the segment and key, the key is only shown on one face of the wheel; the flange F on the other face, covering its other end. In both cases shoulders *c c* are cut upon the segments C, into which are fitted corresponding projections, *i i*, on the keys,—they being so dovetailed or formed that when in place they form a perfect ring; the keys catching underneath the lugs as in the one case, and over the rim as in the other case, are firmly held thereby and by the radial elasticity of the India-rubber ring. The projections on the keys, catching or fitting into the dovetailed shoulders cut in the segments, together with the elasticity of the rubber ring, hold the said segments firmly in place, and thus forming an entire wheel made of parts substantially and firmly put and held together.

The manner of putting the wheel together by means of a hydraulic or other power press is fully explained in my patent before referred to. This present construction admitting, however, of greater facilities; for in my former method the segments had all to be pressed in simultaneously, while by the use of the keys the segments may all be placed in their proper positions, and the keys alone forced in, which, when in place, hold the segments firmly in their seats. The general construction of my wheel is also fully set forth in the letters patent before referred to, and need not again be minutely described.

The invention as herein described, consisting in the method of combining the parts with a view to strength, simplicity, and economy, and which may be considered as the changing of the grooves and projections as set forth in my former patent from

one portion to another of the wheel, and the introduction of the keys between the segments, for the purpose of expediting the insertion of the India-rubber, or for the removing of the same, with due regard to the object to be attained.

Having thus fully described the nature of my invention, what I claim therein as new, and desire to secure by letters patent, is in the construction of car wheels, the combination of the segmental ring and keys, constructed substantially as described, or their equivalents, for the purpose of facilitating the insertion of the ring or band of India-rubber, or other elastic material, between the central portion and the rim of the wheel, and as a means of fastening or holding the whole together, as herein set forth and shown.

NEHEMIAH HODGE.

Witnesses:

T. C. DONN,

A. B. STOUGHTON.

Sections

of patent-cast-steel-tyres

without a weld, supplied from

the Cast-Steel-Works

of Fried. Krupp

at Essen, Rhenish Prussia.

1862.

THOS. PROSSER & SON.

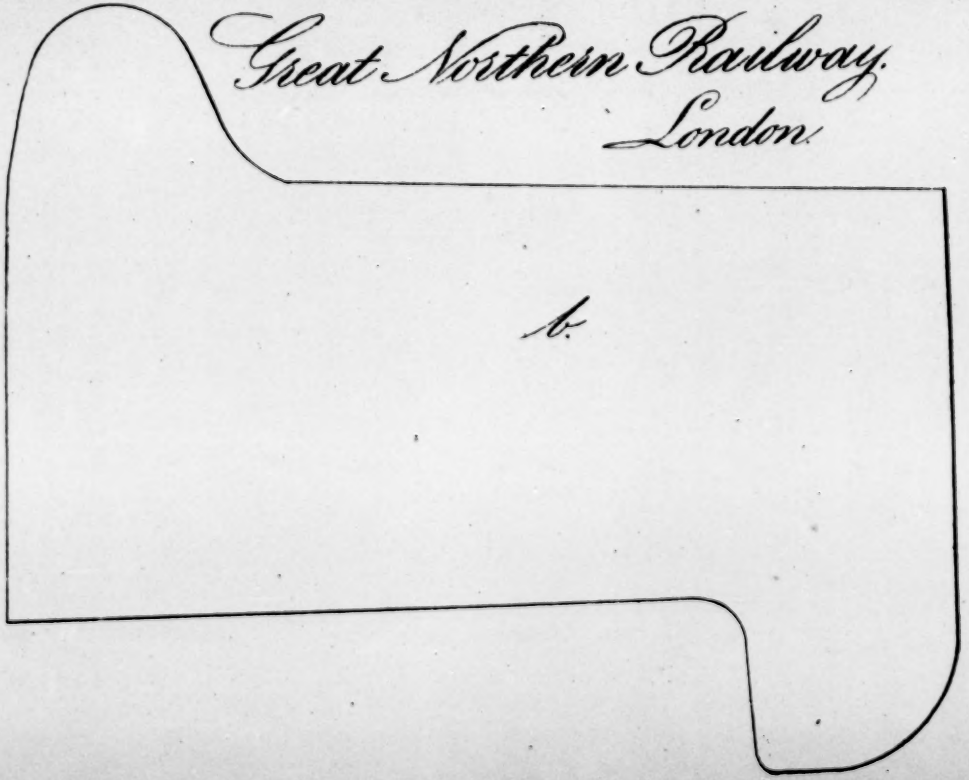
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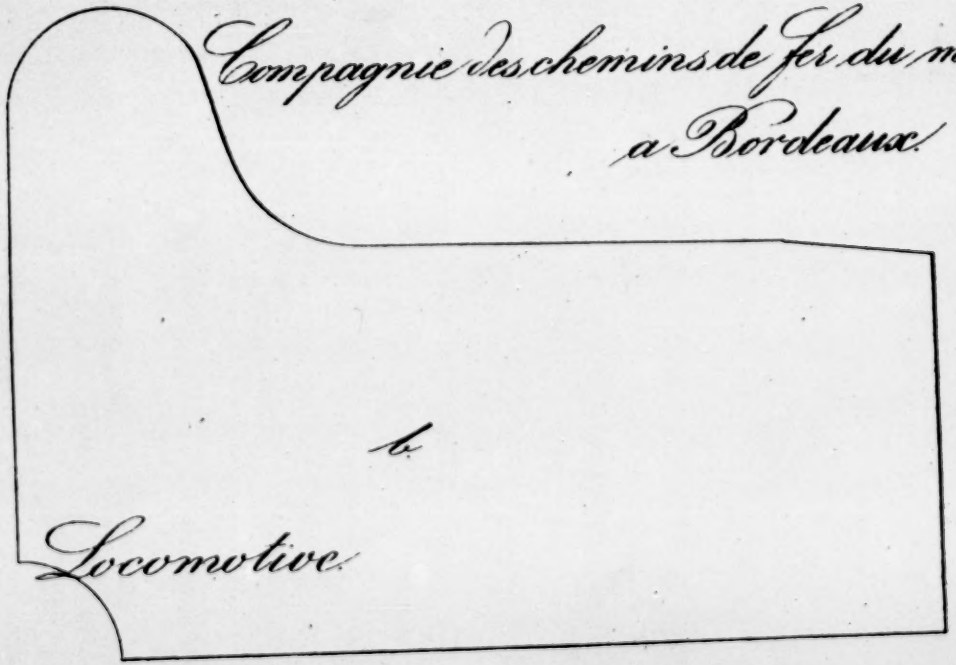
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b.

Locomotive

Great Northern Railway.
London.



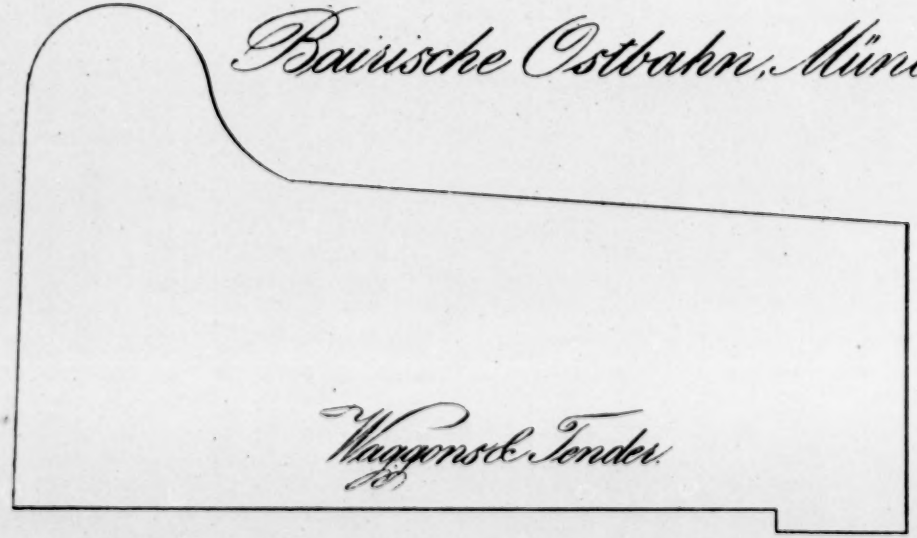

Compagnie des chemins de fer du midi
a Bordeaux
b
Locomotive

Chemin de fer du Luxembourg

b.

Locomotive

Bairische Ostbahn, München.



Supreme Court of the United States.

No. 177.—Oct. Term, 1880.

THE LEHIGH VALLEY RAILROAD COMPANY AND ASA PACKER,

Appellants,

vs.

EDWARD MELLON AND WILLIAM MATTHEWS,

Appellees.

Brief for Appellants.

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Supreme Court of the United States.

THE LEHIGH VALLEY RAILROAD COMPANY AND ASA PACKER,
Appellants,

vs.

EDWARD MELLON AND WILLIAM MATTHEWS,
Appellees.

No. 177.—*Oct. Term*, 1880.

STATE OF THE CASE.

This is an appeal from a decree of the Circuit Court of the United States, for the Eastern District of Pennsylvania, by the Lehigh Valley Railroad Company and others, against whom a judgment has been entered for the sum of $3,018, at the suit of Edward Mellon and William Matthews.

The bill is founded on Letters Patent granted to Edward Mellon on the second day of October, 1866, for an alleged improvement in the mode of attaching tires to the wheels of locomotives, the defendants having been adjudged to use that improvement on their engines without license. The answer denies infringement (fol. 15), and sets up the use of the tires

on their engines, different from the patented mode, but now adjudged to infringe, more than two years before the grant of the patent (fol. 14). The answer also sets up former patents and publications, showing tires and wheels such as the defendants use, many years before the pretended invention of the patentee (fols. 12 and 13).

The Subject Matter.

Railroad locomotive wheels, like wagon wheels, are composed of two parts—a centre, which is usually made of cast iron, although not always so, sometimes having been made of wood, and in Europe always of wrought iron; and a tire, which surrounds the centre or wheel frame substantially in the same manner that a wagon wheel tire surrounds the felloes of an ordinary wheel. Formerly these tires were made of wrought iron; but, since the recent improvements in steel manufacture, they are all now made of steel, and are cast and rolled out in a ring, having no weld or joint. These steel tires are very superior to the old wrought iron tires in their strength and endurance, and in their greater hardness whereby they do not stretch so much upon the wheel centre as wrought iron ones do in use. All locomotive wheels are now made with steel tires.

The invention relates to a mode of fastening tires upon wheel centres, and the controversy has no other scope than that. There are two ways, generally speaking, of fastening these tires upon the wheels: one is, to make them a little smaller in diameter than the wheel centres, then heat them so that they will expand somewhat more than the difference of their diameter, and, in that condition, slip them on the centres and allow them to cool; just as a country blacksmith does in shrinking a wagon tire upon a wooden wheel. Another way is to force them cold upon the centres by means of screws. In shrinking the tires on, the method almost universally used at present, is to turn the wheel centre and bore the tire cylindrical, and to rely upon the contraction of cooling, without any other means whatever to retain the tire upon the wheel (fol. 153). Another method to increase the security due to the adhesion of shrinkage is

by tapping screw bolts through the cast iron rim of the wheel from the inside, whose points are sunk into conical recesses in the inside of the tire after it has been shrunk on. These are called set-screws, but they are not now much used. Another way is, in place of having the centres and tires meet each other in a cylindrical joint, to have some kind of circular lip, either upon the wheel centre projecting outward flange, or upon the tire projecting inward, with a corresponding recess in the opposite part, so that, when the tire has been shrunk on it cannot be driven sidewise off the centre against the resistance of this flange.

The wheels exhibited in Mellon's drawings belong to this latter class.

Figure 1 represents a wheel-centre upon one edge of which a flange is formed of larger diameter than the cylindrical part of the wheel, so that a tire which might slip over the cylindrical portion could not pass over the projecting flange. The surface of junction between the flange and cylinder is a curved surface shown at the letter $c_{''}$ in Figure 1; and the corner of the tire is turned to a curve to correspond, and when it is shrunk onto the centre it makes a close curved joint at the letter $c_{''}$.

Figure 2 shows sections of two wheels; the upper one having the curved flange on the tire at a^1, and the wheel centre curved at its angle to correspond—which is the converse of Figure 1. The lower half of Figure 2 is substantially the same as Figure 1.

It is apparent that in a wheel constructed in either of these ways the tires cannot be driven off inwardly, although they can be driven off outwardly with the same facility with which a cylindrically bored tire could be moved; and the circumstance that they are retained from moving in one direction, is the foundation of the description of that mode of construction, although no claim is based upon it by the patentee in this case.

The specification of the patent sets out two peculiarities in which the inventions are supposed to consist (fol. 21).

First.—"Having the wheel or the tire which is to be fitted "on the same, provided with a *single flange*, arranged in such a "manner that said flange in connection with the usual flange "on the tire will keep the latter on the wheel."

Secondly.—"In constructing the *tire* with *a rounded edge at* "*one side of its inner surface* in order to prevent said edge "from indenting and sinking into the periphery of the wheel; "a contingency which would otherwise occur in consequence "of the tire becoming stretched by long use."

The first of these divisions broadly comprehends the use of a single flange, either on the tire or on the wheel-centre, to co-operate with the usual flange which keeps the wheel on the rail, for the purpose of retaining the tire on the centre; and this purpose would be accomplished whether the flanges were on the centres or on the tires; or whether they formed a right angle with the cylindrical portion of the member of which they constituted a part, or were curved; and obviously this statement, if the state of the art permitted it, in connection with the drawing and description, would be a proper foundation for a claim broad enough to include any of the forms suggested.

The second division however sets forth a very narrow and specific invention, if it may be called such, which is: "construct-"ing the tire with a rounded edge at one side of its inner sur-"face;" and the supposed advantage is to prevent injury to the periphery of the wheel. The rounded corner at c_{11} Figure 1 is the specific thing described.

The specification thus sets out two distinct improvements in the same subject-matter; and the description in the specification develops both of these ideas perfectly, by describing the advantage of a single flange by itself, and also the advantage of the rounded corner by itself. The claim, however, of the patent drops the single flange part of the specification, and confines itself specifically to the "wheel with the curved "flange upon the inner edge in combination with a tire with a "rounded corner, to fit said curved flange, as set forth;" or in other words, it claims the thing shown in Figure 1 or in the lower half of Figure 2 specifically.

The reference in the specification to Hodge's patent, and the discrimination against it, points out the fact that tires had been secured by flanges on both of their edges, so that they could not move either way upon the wheel centre. The drawing of the Hodge patent shows, however, that the flange on the wheel centre is a square corner, and instead of a rounded one, as

shown in the patent, and that on the outside it has a bevelled corner instead of a rounded one.

Why the patent founds no claim upon the fact of using a single flange either on the wheel centre or on the tire for the purpose, does not appear, since the contents of the file wrapper are not in evidence; but it is very obvious that the specification is drawn with reference to another claim than the one which is made, namely, a claim for that of which a part of the invention is said to consist; which is a wheel with a tire fitted on the same, provided with a single flange either on the tire or centre, arranged in such a manner that the said flange, in connection with the usual flange on the tire, will keep the latter on the wheel. It must be assumed that such a claim was presented to the Patent Office and rejected; otherwise the object of this part of the specification is unintelligible.

The Issue.

Upon this patent, and this single claim, the issue of infringement was made; and the fact turned out to be that defendants' wheels were made with a perfectly cylindrical centre, having no flanges, either curved or angular, upon them, and with a tire having a flange projecting inward at right angles to the cylindrical bore and abutting against the square corner of the cylindrical centre; and the question that had to be determined was whether such a construction as that was an infringement of the claim of this patent; and that is the first question which is presented to this court on this appeal.

On page 24 of the Record, No. 5 shows wheels such as the defendants use, and for the use of which they have been adjudged infringers, and have been held to an account. The flange on this diagram is much deeper in proportion than on the real wheel, but the angular corner is the same in both.

Two witnesses only are called to prove infringement—John Swift, and Austin Moore (pages 10 and 11). John Swift produces a model, Exhibit B, similar to the lower section of Figure 2 of the patent, and swears that, in 1866, he saw tires and wheels "substantially similar, in all material respects, to Exhibit B, in the machine shops of the Lehigh Valley Company at Easton." Whether what he saw was before or after the date of the patent, October 2, 1866, does not appear; and,

if before, it is of no importance. On cross-examination, however, this witness says: "I did not notice whether they were "turned with a round or *square corner to the rim or flange.*" This is the only attempt to show that the defendants ever had a wheel in which there was a flange upon the wheel centre; and he does not know whether that flange was curved or square. The fact is, as abundantly proved by all the other witnesses, that there never was a wheel on that railroad having a flange on its wheel centre at all.

The next witness is Austin Moore. He produces a model, Exhibit C, which he says "is constructed in accordance with the upper part of Figures 2 and 3," and, he says, that he has seen locomotives on the Lehigh Valley Railroad constructed similar to that. On cross-examination, he was asked: "Was "the inner rim or flange of the tire rounded, or square, on the "locomotives to which you refer?" And he answered: "I "don't know as to that; I could not tell, as it is covered up; "the corner of the face of the inside rim or flange, in Exhibit "C, *is angular, in the drawing it is curved.*"

Exhibit C, produced by the plaintiffs, and proved by their witness, is, therefore, just such a thing as No. 5, on page 24; and this witness does not know whether the defendants' locomotives had the square corner or rounded one. This is the entire proof of infringement on the part of the complainants to overcome the answer.

If the patent is to be construed to mean what the claim in the plainest language specifies, then no infringement was proved by either of these witnesses; because it would be necessary to prove, first, that the *flange was on the wheel centre* and not on the tire; and, secondly, that that was a curved flange in combination with a rounded corner on the tire; and John Swift, although he swears that the flange was on the wheel centre, does not know whether it was a curved flange or an angular one. Austin Moore does not touch the case at all; because he proves that the *flange was on the tire and not on the wheel centre;* and moreover, he does not know whether that flange was square cornered or curved, although his exhibit, used for the purpose of illustrating the defendants' wheels, has a square corner.

In contradiction of this testimony, if it means anything pertinent, and in support of the answer, Kinsey, the master ma-

chinist of the Lehigh Valley Railroad at one of their establishments, (South Easton,) for sixteen years, and Peter Hofecker, their other master machinist at Weatherly for about the same time, both testify, first, that there were no wheels on that railroad having any flange on the wheel centre at all, but that the wheel centres were turned cylindrical; and, secondly, that the flanges on the tires were rectangular, and not curved; and model Exhibit E is produced to show the fact (see fols. 30–31 and 34–35).

Edward Mellon, the plaintiff and patentee, was called in rebuttal. He swore (fol. 53) that the President "gave him a "pass to examine the engines and see if they had his patent on." He made the examination in company with Austin Moore, the plaintiffs' witness, and he saw "no wheels or tires like Exhibit B." which is the exhibit produced by Swift, as showing wheels on the defendants' road with flanges on the centres with rounded corners.

In accounting under the decree it was proved that the company had never had any engine "with a flange on the wheel with a recess on the tire" (fol. 83); and Exhibit A, page 37, gives a list of a part of the engies belonging to the company which were charged to be infringements, and it appeared that they all had a "square shoulder on the tire," and *not a curved shoulder on the wheel.*

The plaintiffs themselves examined twenty-six other locomotives besides those contained in Exhibit A, and which made up the whole number of locomotives claimed to be infringements of this patent, and they testified:

"We examined a number of the engines named in Exhibit "D, and out of that list we found twenty-six engines which "had Mellon's patent improvement on their wheels and tires, "similar to the upper part of Figure 2 in the drawings an- "nexed to the patent; *that is, with a square shoulder or flange* "*on the inner surface of the tire* (fols. 92 and 95).

So that by the testimony of both sides it is certain that John Swift was mistaken in saying that in 1866 he saw wheels in the shops of the company having a flange on the wheel centres; and that all the wheels used by the defendants had the flanges on the tires, with square shoulders.

It is therefore certain that the case presented no proof of infringement whatever, unless the patent is to be construed to

cover all combinations of centres and tires in which a single flange is used upon either, whether with a square or round corner, for the purpose of holding the tire on the centre.

The learned judge who decided the case delivered no opinion, and therefore we are not informed of the view which he took of the patent, or of the reasons which led to the decree; but it is certain that when all these locomotives of the defendants were made accountable, it was not because they, or any of them, had a flange of any kind on the wheel centre, much less because they had a *curved* flange there, but because they had square cornered flanges on the tires themselves, and no flanges whatever upon the wheel-centres.

On the other hand, the defendants' expert, Kinzey, testifies that if Exhibit C "be intended to represent an angle, it is not "made in accordance with the drawings and specifications at- "tached to the plaintiffs' patent; the Lehigh Valley Railroad "Company do not use any wheel or tire with a rounded flange "in accordance with the plaintiffs' patent" (folio 30); and if the court follows the testimony of the witnesses, the conclusion is that there is no infringement.

CONSTRUCTION OF PATENT.

This brings us to the construction of the patent in view of the state of the art, if indeed it is open to any other construction than the obvious one which the ordinary use of the English language necessarily imposes upon it.

First.—The answer states "that the corporation defendant "had more than two years before the grant of the said Letters "Patent made use of tires having a projecting flange let into "the rim of the wheel to which they were attached in the same "mode substantially as is shown at the letter a' in the second "figure in the drawings attached to the Letters Patent issued to "complainant, excepting that the inner surface of the said flange "was rectilinear and not curved" (folio 14).

Hofecker, the master mechanic, proves that the defendants "first used the shoulder on May 26th, 1864, on the engine "'Pacific,' since then we have continued to use it on steel "tires; it seems to me there came a cut or drawing showing "this shoulder on a tire, accompanying a set of tires pur-

"chased from Krupp in Germany. We bored out this set of "tires with the construction like the drawing, and have con- "tinued to do so since," (folio 34).

An account book showing where the tires came from and the time, is referred to by this witness, and the date is proved by reference to that book, (folio 35).

These tires came from Krupp's, in Prussia, and were accompanied by a book of drawings showing the mode of their construction and use. This book, Exhibit G, was published in 1862 in this country and sent all over the country in large quantities (pp. 30, 31 and 32).

The patent was taken October 2d, 1866, and the supposed invention was alleged to have been made, as sworn to by the patentee himself, about the latter part of July or the first part of August, 1865 (folio 61), which was more than a year after these square cornered tires had been in use on the Lehigh Valley Railroad. There is no contradiction of this testimony, and no doubt about its truth. The engine "Pacific" itself is in the list accounted for, and the time when these tires were put in was proved again (folio 144).

A book of instructions went along with the book of drawings, and was sent with each invoice of those tires sold to the different railroad companies purchasing and using them, showing how to shrink them and how to put them on. Chamberlain (fol. 39) had one of these books, obtained from Prosser & Sons, Krupp's agent, at the time that he ordered the first steel tires, which were put upon the "Pacific," as sworn to by Mr. Hofecker. A reference to that book of drawings shows tires with flanges projecting inwardly with both rounded and square corners. Some of these tires are marked as "ready turned," which means that they were turned by the manufacturers to the proper size, ready to go on to the centres; others were in the rough, as they came out of the rolls (folio 66).

Neither the "Pacific" wheels, nor Krupp's book anticipate, the claim of Mellon's patent for a *round-cornered flange on the wheel centre;* but, if that patent is to be construed to include *a square-cornered flange on the tire*, then it is void; and it is necessary to construe it according to its direct sense in order to save it.

Again, the English patent of Wharton of 1854 shows the tire with shoulders having an acute angle shrunk onto a wheel centre, of which the following is a description:

"The wheel shown in Figures 5, 6, 7, 8 and 9, being a single "spoke wheel, requires a differently constructed tire, but still "adhering to the principle of dovetailing. This I accom- "plish by forming a rib (*E*) on one side of the internal periph- "ery of the tire (*O*), and another rib (*F*) on the outer periph- "ery of the felloe (*W*). Each rib has one of its sides turned "to a dovetail form of a suitable angle, as shown, and fitting, "when put together, into a corresponding dovetail on the fel- "loe or the tire, as the case may be (for it will be seen on "reference to the drawings, that section Figure 8 shows the "same parts as Figure 7, only that the position of the ribs "(*E* and *F*) are reversed); thus, the dovetails lock one into "the other. The smaller rib (*G*) on the other side of the "inner periphery of the tire, is for the purpose of being "clenched or riveted over the rib (*F*) on the felloe after the "tire has been shrunk on. The tire when put on the felloe, "having been previously heated to a good red heat, will expand "until the rib *F* will pass freely into the tire at the rib *G*; "and when the tire, by cooling, has contracted firmly on the "felloe, the rib *G* will enclose the rib *F*, leaving a small "groove or space, as seen at (*G F*) Fig. 9. The small rib *G* "is then clinched or riveted down, as seen in Figures 6, 7 and "8, or the cavity between the ribs *G* and *F*, see Fig. 9, may "be filled with any suitable hard metal, instead of clinching "or riveting the rib *G*."

This wheel is more perfect than the single square flange used by the defendants, because it is not only held from slipping inward by the flanges on the tire, but it is held from slipping outward by the small lip, *G*, which may be riveted over the face of the wheel centre after the tire has been shrunk on.

Also, in Proceedings of the Institution of Civil Engineers, volume 23, 1863–4, a tire and wheel are shown, in which there is a square shoulder formed on the outside of the inner surface of the tire, the same as used on defendants' engines.

Exactly the same formation as used by the defendants is shown in a book on railway machinery by Daniel Kinnear Clark, C. E., published by Blackie & Son, Glasgow, Edinburgh, London, and New York, 1855. The purchase of this book in a book store in Trenton, New Jersey, during the years 1855–6, is proved by Kinsey (fol. 70). The tire there has the same square shoulder as that used by the defendants, and is fastened

to the wheel by shrinkage, and has no other mode of attachment. These publications, establishing the state of the art to be what the defendants were using before the supposed invention of Mellon, control the construction of that patent to the exact language of the claim.

Decree and Reports.

A decree having been rendered for the complainants, an injunction was issued restraining the defendants from using their wheels which were decided to be infringements, and it was referred to Robert N. Willson, a master, to take an account. His report commences on the 49th page, and concludes "that the plaintiff has not shown that "the defendants have made or received any profits or "gains" Exceptions were taken to this report, and on the 22d of October, 1875, those exceptions appear to have been argued to the court, and the case was "referred back to the master with verbal directions from the court, the master being present in court" (fol. 107). What those directions were does not appear on the record, and their substance is not stated in the subsequent report of the master, but their purport can be inferred from the decision subsequently rendered by the master, who, after taking additional testimony, found as follows (fol. 172):—

"That there is a saving or gain to the defendants, from "the use of the plaintiff's invention, of an eighth of an inch in "the thickness of the tires. This he regards as a liberal con- "struction of the proofs in favor of the plaintiff, particularly "in view of the fact that a large portion of the tires used by "the defendants have the projecting shoulder so slightly "elevated that they do not derive the full benefit of the "plaintiff's invention, as it is usually applied;" and upon that principle of computation the Master found, that the defendants had made a profit, which they were bound to pay to the complainants to the extent of $3,018 (fol. 173). Exceptions were filed to this second report (fol. 176), which were overruled by the court, and a final decree entered with a perpetual injunction (fol. 187).

ASSIGNMENT OF ERRORS.

There having been no opinion filed, the grounds of the decree can only be inferred from its relation to the patent, and the thing used by the defendants; and an assignment of errors may be, therefore, to some extent, unjust to the real opinion which the court may have entertained.

First.—The court erred in so construing the patent that its only claim, which is in these words: "I do claim as my invention the wheel with the curved flange upon the inner edge in combination with a tire with a rounded corner to fit said curved flange as set forth," is to be read as if it were, "I claim the securing of tires on the wheels of locomotives by means of a single flange formed on the inner edge of the periphery of the wheel or on the outer edge of the inner surface of the tire." The single claim is specific and narrow, and obviously relates to and is connected with the second division of the entire invention as set forth in the specification, there being no claim whatever founded upon the first division.

Second.—The court erred in finding that there was any infringement proved in the case. The only testimony—that of John Swift (fol. 26)—which attempts to show that the defendants ever had a wheel in which there was a flange formed on the wheel for the purpose of holding the tire, is contradicted by every other witness in the case on both sides, who claim to have knowledge of the facts; and in the accounting before the master there is no pretense that any such wheel as that existed, and no account is taken of it. But, if John Swift were not contradicted, he fails to prove that such a flange was a curved flange upon the inner edge "in combination with a tire with a rounded corner to fit said curved flange;" on the contrary he says: "I did not notice whether they were turned with a round or square corner to the rim or flange."

Third.—The court erred in finding that a flange on the tire, with a square corner abutting against the outer face of the wheel, was an infringement of the patent. No witness was called by the plaintiffs to prove that it was substantially the

thing described and claimed in that patent. Austin Moore was the only witness on the subject, and he was asked this question:

"Second-Interrogatory. Examine Exhibit C, and Letters "Patent Exhibit A, and state whether or not Exhibit C is "constructed in accordance with the drawing and *specifications* "contained in the Letters Patent referred to? A. I find that "it is constructed in *accordance with the upper part of Figures* "2 *and* 3; there is no lower part in Figure 3; Figure 3 is drawn "to show the effect of the stretching of the tire from rolling "on the rails; it stretches the tire in the centre part of the "tread" (fol. 28).

Exhibit C referred to has an angular flange on the inside of the tire, whereas, in the drawing of the patent it is curved, as Moore swears. Exhibit C is therefore like the wheels made by the defendants; and although Moore was asked the question, whether Exhibit C is in accordance with the drawing and *specification* of the patent, he did not answer it; but said that it was in accordance with the upper part of the figures 2 and 3, except that in those figures the flange is curved, whereas, in Exhibit C, it is angular (fol. 28).

On the other hand, Kinsey (fol. 30) swore that Exhibit C, with an angular flange, "is not made in accordance with the "drawings and specification attached to plaintiff's patent; the "Lehigh Valley Railroad Company do not use any wheel or "tire with a rounded flange, in accordance with plaintiff's "patent." Therefore there was no testimony of any expert before the court to show that the wheels used by the defendants were an infringement, but there was testimony by an expert denying the charge and supporting the answer.

Fourth.—The court erred in overruling the master's report first filed. There was no proof before the master of any gains and profits whatever, by the use of the wheels with square-cornered flanges; and there is not in the testimony on record, one single word to show any such profit. On the contrary, the accounting before the master was opened by the following statement by the counsel for the complainant (p. 39, fol. 85).

"The counsel for complainant, in proceeding to offer proofs "to show the net profits or gain to the defendants from the "use of the plaintiff's invention, states that in view of the fact "that from the nature of the invention such profit, value, or "gain, consists of elements such as ease and economy and sav- "ing of time in its manufacture, application and repair, addi- "tional durability from its form, great safety in use, and other "items of advantage over other forms of locomotive tires and "wheels, and methods of securing the same to the wheel, as "testified to in the deposition of Mr. Conwell, page 47, be- "fore the examiner, such items of advantage, gain and profit "*being incapable of accurate estimation in dollars and cents*, "now proposes to prove that the plaintiff, since the issue of "the Letters Patent to him, has publicly offered to license "parties to use his invention at a fixed royalty, and entered "into contract with different parties, builders of engines and "railroads companies, who, in view of the value of the inven- "tion, and of the gain, profit and advantage derived from the "use of the same on the engines made by them, have been "willing to allow therefor and thereout, and have allowed and "paid to the plaintiff therefor and thereout certain sums of "money, viz.: the royalty price aforesaid, for the privilege or "license to apply and attach to and upon their engines, and "*use until finally worn out*, tires and wheels constructed in ac- "cordance with said Letters Patent, at the following rates:"

The Master's second conclusion is founded upon testimony which he correctly summarises in his report as follows (p. 88, fol. 169):

"In this connection it may be noted that, notwithstanding "the witnesses called on behalf of the plaintiff, state that, in "their opinion, the Mellon tire can be worn thinner than a "tire fastened by plain shrinkage, they also say, in sub- "stance, that in the actual use of tires fastened by the two "methods, *they make no difference in favor of either*; that "they cannot tell how much thinner the Mellon tires can be "worn, or whether they are as likely to get loose; that when "the Mellon tires are worn down to seven-eighths of an inch, "for instance, they are not fit to be used by the 'average en- "gineer,' and that, if either tire should be broken or loose, it

"would only be safe to run the engine to a shop or switch. "In point of fact, the use of locomotive engines does not in- "dicate that much loss has accrued from broken or loose "tires, in ordinary cases, or that there is any serious difficulty "in getting an engine, whose tires are secured by plain shrink- "age, home to a shop or a place of safety.

"On the other hand, the defendants' witnesses (some of "whom are in the employ of the company in position of re- "sponsibility) express the opinion, in some cases founded "upon personal knowledge of the Mellon tire and in others "merely upon theory, that there is no practical advantage in "the use of that tire or mode of fastening over plain "shrinkage.

"These witnesses are quite as numerous as those called on "behalf of the plaintiff, and for aught which the Master can "perceive, they are equally honest and trustworthy. As has "been stated, all of the witnesses are compelled to testify *upon* "*mere opinion as experts*, in anticipation of the definite re- "sult of experience. It may be that it is an infirmity of the "plaintiff's case that, owing to the peculiar subject matter of "the invention, so much time is required to reach a demon- "stration of its merits by comparison of actual experiences. "In this position of things, *it is impossible for the Master to* "*bring his mind to rest upon any conclusion* with reasonable "assurance that he will thereby do justice to either party. It "does seem to him, however, that the mechanical features of "the invention in question are of such a character as to in- "duce an *a priori* judgment in favor of the greater durability of "a tire fastened by means of it, for the reason before referred "to, that a resistance is offered to the lateral force of the en- "gine which does not exist where the tire is secured by "shrinkage alone.

"Besides this, the defendants are in the position of tres- "passers upon the plaintiff's rights, and of having applied his "invention against his protest, and in defiance of his suit, "*until they were stopped by the process of the court.* Even "a doubt in such a case ought, in the opinion of the Master, to "be resolved against an infringer. It will, therefore, be "treated by him as established that the use of the Mellon in- "vention adds to the life of a tire, as compared with the use "of shrinkage only. * * * *

"Looking, then, elsewhere than to Mr. Mellon for informa-
"tion by which a fair comparison can be made, and remem-
"bering that in a department of business where such serious
"interests of life and property are at stake as in the conduct
"of railroads, the extreme possibility of endurance ought not
"to be taken as the practical measure of capacity, the master
"finds no other standard by which he can estimate the
"amount of the defendants' savings or gains than that which
"is afforded by the testimony of Mr. Conwell. The witness is
"not altogether clear or consistent in his statements, *but it*
"*may be inferred*, from what he says, that the Mellon tires
"can be safely used until they are an inch in thickness, and
"that tires fastened by simple shrinkage may, with as much
"safety, be worn to a thickness of an inch and an eighth. Mr.
"Graham, one of the defendants' witnesses, also stated that
"on his railroad tires secured by the *latter plan* were run un-
"til they were worn to a thickness of less than an inch and an
"eighth" (p. 90).

It thus appears that not only there was no proof of profit by the defendants, but the complainant admitted there was none proved, and that the advantage was "incapable of accurate "estimation in dollars and cents." An expert opinion, contradicted by experts, as to the probable saving, if the defendants had been permitted to wear the tires out, is the only basis of the account.

The plaintiff utterly failed to prove an established royalty, but attempted to do it by proving that he had offered to sell his invention at certain prices, which the counsel for the plaintiff insisted should form the basis of computation of profit by the defendants, if they used that invention.

Fifth.—The court erred in giving such verbal instructions to the Master, whatever they were, that the Master, in accordance therewith, reported (folio 172) "that the defendant had "made a saving from the use of the plaintiff's invention of "an eighth of an inch in the thickness of the tires."

Whatever might be true in respect to the possibility of the saving of an eighth of an inch thickness, as compared with the other methods of securing the tires to the wheels, the defendants in this case never realized any such advantage. They were put under injunction, both interlocutory and final, and

the evidence shows that none of the tires were ever worn down to the point at which the supposed advantage of an eighth of an inch could have been realized. This advantage, if it ever could occur, would only be realized after the tires had worn down to the thickness at which tires, as usually made, are no longer useful, after which it is *guessed* by some experts and denied by others, that the tires fastened according to the patent might be used until they were an eighth of an inch thinner; but that state of things never occurred in this case, and there were no such profits realized (3 Wall., 315).

The tires, when first applied, were of the usual thickness, so that the outlay was the same in the first instance, and the supposed saving only occurs at the end of the life of the tire, which was never reached by the defendants. "*We have worn out and taken off none of the Mellon tires since we put them on*" (Kinzey, fol. 148), (fols. 156, 170).

Sixth.—The court erred in not reversing the Master's report under the exceptions, which were as follows (p. 92, fol. 176):

"I. Because the Master reports that 'it may be inferred "'from what he (the witness Conwell) says, that the Mellon "'tires can be safely used until they are an inch in thickness, "'and that tires fastened by simple shrinkage may, with as "'much safety, be worn to a thickness of an inch and an "'eighth.'

"II. To the Master's conclusion that there is a saving or gain "to the defendants from the use of the plaintiff's invention of "an eighth of an inch in the thickness of the tires.

"III. Because the Master reports that 'if there is a saving "'of one-eighth of an inch in the thickness of the tire, it fol-"'lows that one-twentieth of the lesser (two and one-half "'inches thick) and one-twenty-fourth of the larger (three "'inch) tires are gained or saved by the use of the plaintiff's "'invention.'

"IV. Because the Master reports that the defendants have "saved or gained the sum of three thousand and eighteen dol-"lars ($3,018) by the use of the plaintiff's invention.

"V. Because the Master erred in reporting that any gain or "saving had accrued to the defendants by the use of the plain-"tiff's invention.

The result of the Master's report is, that it is a mere speculative opinion on the part of witnesses on both sides whether there is or not any advantage in the use of the patented method, even if it had been used long enough to wear out; that witnesses of equal credibility and knowledge express different opinions upon those speculative points; that there is no proof of any fact to support the opinion of either side on that subject; that the defendants have not derived the advantages, if there be any, because they have not used the wheels until the time arrived when that advantage could be realized, being under the injunction of the court; that the testimony of the only witness upon whom the Master relied is not altogether clear or consistent, but that his opinion, whatever it is worth, is refuted by the facts proved by Mr. Graham, that on his railroad tires, secured merely by shrinkage, are worn thinner than the plaintiff's witness thinks they could be worn; but, all things considered, and the defendants being trespassers, although they made no profit, the Master has found against them in the sums mentioned.

POINTS.

The patent should not be enlarged by construction beyond the claim which the Patent Office has admitted, and which the patentee has acquiesced in, beyond the fair interpretation of its terms. In this case, unless the patent be construed entirely regardless of the specific matter claimed, which is a rounded flange on the wheel in combination with the rounded corner on the tire, no one of which things the defendants use, there is no case for the plaintiff at all. It cannot be so construed fairly, because the specification itself expressly points out two inventions distinct from each other. One of these covers a mode of operation which consists in a single flange either upon the tire or upon the wheel for the purpose of holding the tire on the wheel. The other covers only a narrow and specific thing. The first of these is not claimed at all; while the second is claimed in perfectly distinct terms.

This state of facts in the specification, instead of enlarging the claim, confines it within its own terms; because the patentee had perfect knowledge of the distinct character of the two things about which his specification treats, and if it was inadvertance,

accident, or mistake, by which he did not claim one of these things, the remedy is in the Patent Office, not in the courts. If, on the other hand, he was rejected in the Patent Office, upon a claim founded on the broad invention described in his specification, which can only be known by the contents of the file wrapper, fortunately for the complainants, not in this case, then the attempt to enlarge the specific claim to the broad invention is not conscionable.

This court has lately decided that, "as patents are pro-"cured *ex parte*, the public is not bound by them, but the "patentees are. And the latter cannot show that their invention "is broader than the terms of their claim."

Keystone Bridge *vs.* Phoenix, 95 U. S., 279.
Burns *vs.* Meyer, 100 U. S., 672.

If these rules apply to this case then there is no infringement and no pretence of it, and the decision must be reversed bodily.

It cannot be contended that the claim of this patent *must necessarily be construed* to cover a square cornered flange on the tire; on the contrary, any such construction must be reached by implication, and by doing violence to the language of the claim. In that point of view the state of the art must be looked at; and in this case that settles the question. The defendants in this case were using the square cornered flange on the tire more than a year before the patentee pretends that he made any invention. If the patent is to be construed as it is written, this fact does not anticipate it, and it is not pleaded as an anticipation, but it conclusively controls the construction; otherwise the patent would perish in view of this fact, instead of being sustained, which would be contrary to law. The same remark is true in respect to the Prosser tire publication from which the defendants derived their knowledge of the square cornered flange on tires. The same is true in respect to the "Kinnear Clark" book, where the precise thing used by the defendants is shown many years earlier.

Infringement.

Infringement cannot be presumed, it must be proved, and the burden of proof is upon the complainant. In this case there is no such proof. No witness has sworn that the square cornered flange on the tire, in combination with the cylindrical wheel, is the thing described and claimed in the plaintiff's patent.

The contrary, however, is sworn to by the defendants' witness, and is set up in the answer. If appeal were made to the vision and mechanical skill of the court below, we have not the benefit of his Honor's views on that subject; and if the appeal is made to the vision and mechanical knowledge of this court, it is very apparent that a square cornered flange on a tire, in combination with a cylindrical wheel, is not the thing specified and claimed in the patent.

The bill, therefore, must be dismissed, on the ground that there is no infringement proved.

Anticipations.

If the patent is construed as the claim is written, it is not anticipated by any testimony offered; but it must be so construed in order to save it.

Gains and Profits.

The prayer in this bill is for profits, and not for damages, and the accounting is strictly in equity. The burden of proof is upon the plaintiff to show the profit derived by the defendants from the use of the invention, if they have used it. He is entitled to examine the defendant's books and accounts, and to have all the assistance of the court in arriving at the result of the defendant's business; but when that is all done, he must establish the profit the defendant has made, and it must not be guessed at or speculative, but must be positively proved.

The question to be determined is "what advantage did the "defendant derive from using the complainant's invention over

"what he had in using other processes then open to the public "and adequate to enable him to obtain an equally beneficial re- "sult" (Mowry *v.* Whitney, 14 Wall., 620). In this case it is proved beyond question that the great majority of all locomotive tires are shrunk onto the wheels without using flanges at all; and there is no advantage proved in the use of flanges which the defendants have realized.

And in his second report, the Master admits that there is no certain proof of the possible value of this invention, and that there is no proof at all that, if it had any possible value, the defendants have ever realized it; on the contrary, it is shown that they have not.

This court, in the case of Livingston *vs.* Woodworth, 15 Howard, p. 559, passed upon a master's report singularly like the one in the present case in every respect.

The court says:

"The Master, in this report, made in pursuance of the in- "structions just adverted to, admits that the account is not "constructed upon the basis of actual gains and profits ac- "quired by the defendants.

* * * * * * *

"He admits, too, that the rate of profits assumed by him "was conjectural and not governed by the evidence; but he "attempts to vindicate the rule he had acted upon by the "declaration that he was not aware that he had infused into "the case any element too unfavorable to the defendants. "That by the decision of the court they were trespassers and "wrongdoers in the legal sense of these words, and conse- "quently in a position to be mulcted in damages greater than "the profits they have actually received, the rule being not "what benefit they have received, but what injury the plain- "tiffs have sustained."

"To what rule the Master has reference in thus stating the "grounds on which his calculations have been based we do not "know. We are aware of no rule which converts a court of "equity into an instrument for the punishment of simple torts.

* * * * * * *

"We think that the second report of the Master, and the "final decree of the Circuit Court, are warranted neither by "the prayer of the bill, by the justice of this case, nor by the "well established rules of equity jurisprudence."

Under any aspect of the case, assuming the patent to be valid and to cover the defendants' wheels, there is not a particle of evidence to support the finding, which can be sustained upon the principles governing accounts.

The complainant attempted to show an established license fee. If he had succeeded it would not have had any bearing upon this case, which is simply an accounting in equity. It would have afforded a measure of damages, if there had been a prayer and decree for damages (provided always a court of equity is competent to find damages above twenty dollars under the constitution). The facts upon which the plaintiff proceeded was that the Dixon Locomotive Works paid him a license fee under a bond to refund in case he failed in his action against these defendants, and the Delaware & Lackawanna Railroad Company paid him two hundred and fifty dollars and then refused to pay.

Both of these parties, however, were using the invention described and claimed in the patent; that is, a curved flange on the wheel, with a rounded corner on the tire. In this case the defendants, using the square cornered flange on the tire, are using that which the patent declares to be injurious, and against which it discriminates by saying that "with my improvement the flange *a* will cause the inner edge of the inner surface of the tire to indent the periphery of the wheel, or form a crease in it, if the edge *c* were not rounded."

The decree must be reversed.

EDWARD N. DICKERSON,
Counsel for Appellants.

January 4, 1881.



Supreme Court of the United States.

No. 177. *October Term, 1880.*

The LEHIGH VALLEY RAILROAD COMPANY and ASA PACKER,

Appellants,

vs.

EDWARD MELLON and WM. MATTHEWS,

Appellees.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

BRIEF FOR APPELLEES.

HECTOR T. FENTON,
FURMAN SHEPPARD,
Counsel for Appellees.



Supreme Court of the United States.

No. 177.

THE LEHIGH VALLEY RAILROAD COMPANY and ASA PACKER, President of said Company, *Appellants*,

vs.

EDWARD MELLON and WILLIAM MATTHEWS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF OF ARGUMENT FOR APPELLEES.

Letters Patent of the United States were granted October 2, 1866, to Edward Mellon, for his invention in mode of attaching tires to wheels of locomotives. The Bill, filed in the Court below, charged the appellants, defendants below, with infringement of the exclusive privileges secured by the patent, in the making and using, without license and authority, the invention therein described and claimed. The answer filed set up several defences, only two of which were pressed at the hearing, viz.: a denial of infringement, and an allegation of want of novelty in the invention patented. Under the first defence, the

question as to the proper construction to be given to the appellees' patent, and the scope of the claim were fully argued and considered, in view of the state of the art at the date of the invention and the great utility of the patented device. Under the second branch of the defence there was some parol proof as to alleged prior use; and several patents, books, publications, and circulars were offered in evidence. Each of these will be herein considered separately, and their irrelevancy shown. The cause was so proceeded with, that after a full hearing on the pleadings and proofs, and extended and exhaustive argument by counsel, a decree was entered sustaining the Bill, decreeing the patent to be valid, and that the appellants (defendants below) had infringed upon the appellees' exclusive rights under it; awarding an injunction and referring the cause to a Master to take an account of profits. Upon the coming in of the Master's report, and the hearing of exceptions thereto, a final decree was entered in favor of appellees for the sum of $3,018 profits and gains, together with costs of suit; whereupon the defendants below appealed to this Court.

HISTORY OF THE ART.

It appears from the scientific publications and foreign and American patents, printed and issued during the past forty years, relating to locomotive engineering, railroad construction, and its kindred subjects, and it is a matter of common knowledge,

that the art of engine building in all its details has made vast strides, and in latter years reached a degree of perfection only to be accounted for by the imperious demands of the present generation, for the safest, simplest, and best; and the great commercial interest of the country, for the swiftest and most powerful of that class of machines.

Locomotive engines were, at the beginning of the period of time mentioned, comparatively light machines, weighing from three to ten tons, and of moderate speed, varying up to ten or fifteen miles per hour. With such engines and for such speeds, wheels of light construction only were demanded and required; these were, for most part, constructed of wood and iron, and were not dissimilar in general principle of construction to heavy wagon wheels; gradually, from time to time, such wheels were made and provided with a supplementary metal-rim or tire, in addition to the ordinary rim of the wheel, in order not only to strengthen the wheel, but to facilitate the repair of the worn-out outer portion or rim. An instance of this form of wheel applicable, as the patentee says, both to engines and railroad carriages, is shown in the English patent granted in 1853, to Emanuel Wharton, and offered in evidence by the defendants below in this cause. The wheel therein described, "is made in two halves, as shown in Figs. 2, 3, and 4, for the purpose of securing firmly between them the tire (C), which has a dovetail rib (B), formed round the internal circumference in the middle of its breadth.

The tire is turned slightly taper on each side of the dovetail rib (B), and in putting the wheel together the tire may be slightly heated. The halves of the wheel are then drawn tight into the tire with bolts and nuts until they are in close contact, and have a firm hold of the dovetail rib (B). Distance pieces (D, Figs. 2, 3, and 4,) being placed between the arms of the wheel; screw-bolts are then removed, one at a time, and rivets inserted in their places, and the whole firmly riveted together. It is also riveted through the nave or boss in the same manner. When a tire is worn out, the wheel is separated by removing the rivets, and a new tire put on in manner before described." See Figs. 3 and 4, Wharton's patent, page 21 of supplemental record.

In this drawing, the letters AA represent the halves of the wheel, made in sections as described. Various modifications of the same general mode of construction are shown and described; but this patent is cited here as a fair illustration of the practical result of endeavors made, at or about the date of that patent, and for several succeeding years, by engineers and engine builders to construct a stronger wheel, and one in which the wearing portion (thus, at that date, become a supplementary rim or tire, and not the periphery of the wheel) could be held or secured on the wheel; and removed, and its place supplied by a new tire or rim when worn out. Attempts were also made at or about that time to overcome, or rather to prevent the damaging results from the jars and con-

cussions to which locomotive and car wheels were subjected; and particularly so, as in course of time, engines and cars came to be made larger and heavier. To this end, one Nehemiah Hodge obtained a patent from the United States Government, No. 8,526, dated November 18, 1851, for "Improvement in Railroad Car Wheels," which was offered in evidence by the defendants below. It seems to be applicable only to car wheels, and in the patent, the patentee says: "My invention consists in making a car wheel in not less than *two concentric parts*, and connecting these parts by vulcanized *india rubber*, or other analagous elastic material interposed between them, whereby the annular or *other* part of the wheel is insulated from the central or inner part, by a substance that *will not transmit vibration* from the rim to the centre or axle of the wheel, whether such vibrations be lateral or radial in direction." By reference to the drawing annexed to this patent, see page 12, of supplemental record, the construction of the wheel will be fully understood. A is the body; B is a metal rim; these being connected together by segments of metal D, driven in at proper places around the wheel; and between the body and the segments D, is inserted an annular cushion C, of vulcanized rubber.

As engines came, in course of time, to be made still heavier, the wheels thereof were required to be constructed in a more durable manner, and finally resulted in a wheel-centre of cast-iron in one piece, either solid or with spokes cast therein, and provided

with a wrought iron rim or tire fastened to the wheel-centre by rivets passing through the tire, or by set screws, in the case of spoke wheels, inserted through the felloe of the wheel-centre and penetrating a short distance into the tire. By reference to Vol. 1, page 238, of a work entitled "Railway Machinery," &c., by Daniel Kennear Clark, published in London in 1855 (the 2d volume containing plates only, was offered in evidence by the defendant below), it will be found that at that date the tire which was provided with the usual flange to hold and guide it on the rail was plain or cylindrical on its inner surface, and was slightly—say one-thirty-second of an inch per foot of diameter—smaller in internal diameter than the periphery of the wheel-centre, which was also plain or cylindrical; the tire was then heated to expand it, and in this condition slipped on the wheel, where it contracted by cooling, and was then secured by bolts, rivets, or screws, as described. The sizes of the tires and wheels, and their mode of application, one to the other, at that time, are described in that publication in the following clear and concise language:

"The tire, which is the wearing part, and is placed over all, is made of Lowmoor iron, to wear equally and well. It is bored out to a slightly smaller diameter than the rim of the wheel, so that when expanded by heat it may be slipped over the rim, and may shrink on tightly when it is cold. The *shrinkage* measured diametrically, should not exceed $\frac{1}{32}$ inch per foot diameter of the wheel. Shrinkage is useful

for taking up the slackening of the tire by rolling out, as it wears; but if too much is given, the wheel is unduly strained, and the tire is liable to snap. * *

"Tires are, in general, 5 inches broad, 2 inches thick at the middle of their width, and coned on the outside at the rate of 1 in 20 on the radius, or ¼ inch for the whole width of five inches. They have, in some cases, been made only 4¾ or 4½ inches broad, as it is found that the direct wear takes place only in the middle of the breadth; the economy of narrowing the tire is, however, questionable, as the outer part, though not directly worn, is useful for staving in the middle part and keeping it to its work. Indeed, the rolling out of the tire laterally is obvious upon worn tires. Still further, to aid in staving in the wearing parts, Sharp and others make their goods engine tires 5½ inches broad. Of course, the more heavily the wheel is loaded, the greater is the lateral tendency to spread. The tire is sometimes made 2¼-inch thick, and even 2½-inch. * * * *

"The flange is usually made to project 1¼ inch from the surface of the tire, sometimes only 1 or 1⅛ inch, and though the deeper flange is nominally the safer, there appears no ground in practice for preferring it. The root of the flange is the part that guides the wheel; at this part the flange is well rounded into the form of the rails, so as to act smoothly, and is sloped off to the summit. The thickness at the middle of the height is from 1 to 1¼-inch; the greater

with a wrought iron rim or tire fastened to the wheel-centre by rivets passing through the tire, or by set screws, in the case of spoke wheels, inserted through the felloe of the wheel-centre and penetrating a short distance into the tire. By reference to Vol. 1, page 238, of a work entitled "Railway Machinery," &c., by Daniel Kennear Clark, published in London in 1855 (the 2d volume containing plates only, was offered in evidence by the defendant below), it will be found that at that date the tire which was provided with the usual flange to hold and guide it on the rail was plain or cylindrical on its inner surface, and was slightly—say one-thirty-second of an inch per foot of diameter—smaller in internal diameter than the periphery of the wheel-centre, which was also plain or cylindrical; the tire was then heated to expand it, and in this condition slipped on the wheel, where it contracted by cooling, and was then secured by bolts, rivets, or screws, as described. The sizes of the tires and wheels, and their mode of application, one to the other, at that time, are described in that publication in the following clear and concise language:

"The tire, which is the wearing part, and is placed over all, is made of Lowmoor iron, to wear equally and well. It is bored out to a slightly smaller diameter than the rim of the wheel, so that when expanded by heat it may be slipped over the rim, and may shrink on tightly when it is cold. The *shrinkage* measured diametrically, should not exceed $\frac{1}{12}$ inch per foot diameter of the wheel. Shrinkage is useful

for taking up the slackening of the tire by rolling out, as it wears; but if too much is given, the wheel is unduly strained, and the tire is liable to snap. * *

"Tires are, in general, 5 inches broad, 2 inches thick at the middle of their width, and coned on the outside at the rate of 1 in 20 on the radius, or ¼ inch for the whole width of five inches. They have, in some cases, been made only 4¾ or 4½ inches broad, as it is found that the direct wear takes place only in the middle of the breadth; the economy of narrowing the tire is, however, questionable, as the outer part, though not directly worn, is useful for staving in the middle part and keeping it to its work. Indeed, the rolling out of the tire laterally is obvious upon worn tires. Still further, to aid in staving in the wearing parts, Sharp and others make their goods engine tires 5½ inches broad. Of course, the more heavily the wheel is loaded, the greater is the lateral tendency to spread. The tire is sometimes made 2¼-inch thick, and even 2½-inch. * * * *

"The flange is usually made to project 1¼ inch from the surface of the tire, sometimes only 1 or 1½ inch, and though the deeper flange is nominally the safer, there appears no ground in practice for preferring it. The root of the flange is the part that guides the wheel; at this part the flange is well rounded into the form of the rails, so as to act smoothly, and is sloped off to the summit. The thickness at the middle of the height is from 1 to 1¼-inch; the greater

thickness is better, as it gives a stiffer flange, and assists in preventing the lateral displacement to which thin flanges are liable. * * * * * *

"The tire is secured to the wheel by conical rivets entered from the outside, and riveted inside the ring, or screwed up with a nut. The rivet or bolt should be made with a long taper to retain its hold while the tire wears down, and should be of iron not harder than the tire, so as to wear with it; nor much softer, as it staves in, in course of time, and loses its grip."

* * * * * * * * * * *

The evidence in the cause, in the Court below, showed greater advances still in the art, for it was therein shown that steel was substituted for wrought iron in making the tire, introduced in the United States about the year 1864 or 1865; a harder metal being required for a part of the engine subjected to such jars and shocks and violent attrition; so that by the year 1866, when the plaintiffs' patent was issued, engines had increased in weight from machines weighing three or four tons, with light wheels constructed in part of wood, rubber, and iron, to ponderous machines weighing thirty to forty tons, with wheels of cast iron five and a-half to six feet in diameter, and provided with steel tires 2½ to 3 inches thick, the tire alone weighing from 800 to 1,400 pounds, the average being 1,000 pounds.

In this state of the art, two difficulties arose (1), the injurious strain upon the hard steel, arising from overdue expansion and contraction in shrinking the

tire upon the wheel, and (2), the weakening of the metal by the rivet and bolt holes; indeed, the rivets, passing *through* the tire, were entirely given up, and set-screws or nipple-bolts used, which penetrated but a short distance into the tire (see Exhibit Parry,). The jars and concussions to which the tire was subjected, not only loosened the hold or force of the shrinkage, but caused the tire to rise in the centre (see Exhibit Lisk, page 19 of record), and so break the bolts. In such case, when the tire became loose, the engine would leave the track, the wheel passing directly *through* the tire. These difficulties are thus described in a publication bearing date 1864, London, entitled "Minutes of Proceedings of Civil Engineers, &c., session of 1863–4" (offered in evidence by the defendants below). In it is contained the following paragraph: "A *loose* tire is one of the things denounced as a source of danger on railways, and to be carefully guarded against. It is most dangerous in case of a tire fastened with through bolts or rivets, because it indicates that the tire has lost the condition of a true circle, and become a ring of many segments, constantly striking blows. But a *tight* tire is also a source of danger, by reason of its tendency to burst, especially in time of frost."

In this state of the art, the appellee, Edward Mellon, devised a most ingenious and yet exceedingly simple device, for which he obtained the patent in suit, on an application filed by him October 6, 1865. His main object was to make railroading safe by pre-

venting the wheel slipping through the tire, and so causing the engine to leave the track, when the force of the shrinkage lost its hold by stretching of the tire, and the latter became loose on the wheel; his second purpose was to dispense with both screws and rivets, and so make a stronger and more perfect tire without perforations; and lastly, by a device which *assisted* the shrinkage to hold the wheel and tire tight, to use a less amount of shrinkage, and so avoid the danger arising from a "too tight tire" before referred to, caused by undue expansion and contraction. He furthermore explained in his specification that the rising of the tire in the centre might, with his device, cut or indent the periphery of the wheel-centre, and so advised making the edges of the impinging surfaces round. The result was a saving of many tires from bursting caused by overdue expansion and contraction; absolute safety, in that it was impossible for the wheel to pass through the tire, though the latter became absolutely loose on the former; a greatly stronger tire, from the absence of perforations from bolt holes; a great saving of metal, because tire which had formerly been so perforated could not be worn nearly so thin as his; and lastly, the facility with which his tire could be removed from the wheel when it became loose, without injuring either, and lined up and replaced without taking the engine from the track. Even as compared with steel tires, perfectly plain on the inner surface, placed on a plain cylindrical wheel-centre, and not secured by bolts or

screws, or in any other manner, and held in place simply by the force of the shrinkage, the appellee's device was by far the most economical, in that it permitted the tire to be worn quite thin (the flange assisting the shrinkage to hold it tight); and as respects safety, there can be no comparison, for the other was indeed absolutely unsafe, especially when worn down thin, and stretched from use.

THE PRIOR PUBLICATIONS.

(1). Railway Machinery, &c., by Kinnear Clark.

The work entitled "Railway Machinery, a Treatise on the Mechanical Engineering of Railways," by Daniel Kinnear Clark, was published, as appears by the imprint, in 1855, by Blackie & Son, and is a foreign publication, and consists of two volumes, Vol. II. containing plates only, Vol. I. consisting of descriptions of the several plates in the succeeding volume. It is a very significant fact that only vol. II. (that containing the plates) was offered in evidence by the appellants, and they made reference to, and relied upon, plates 35 and 42 (see pp. 26 and 27 of supplemental record); of these, plate 42 is styled "open box wagon," and is a transverse section of what is apparently a railway freight-truck, with an open box frame upon it; the drawing does not show the device patented to the appellee, because it is apparent that the wheel structure is made in sections or parts; pieces of metal, wood, or whatever the material may be, are clearly seen in

the drawing between the tire or rim and the hub, riveted on the latter; indeed, for ought that appears, there may be no tire whatever but only a flanged band of metal, within which a compound wheel of wood and metal is built, and the whole fastened together by rivets or screws; the side view shown in the exhibit (but not printed in the record), would seem to indicate clearly the use of screws or rivets passing laterally through the wheel for the purpose stated. The same remarks apply equally to the other plate, 35, which is styled "third-class carriage." There is not a word in the exhibit, which is the second volume only, of the publication, explaining these devices or any part of them; and the exhibit falls within the ruling laid down in the cases cited hereafter in the comments on Krupp's book, Exhibit "G." A reference to volume I., however, throws no light whatever upon the construction of the wheels, or tires if there be any, of the wagons or cars shown in either of these plates; but it does describe the construction of the wheels and tires for *locomotives*, and the language used, which has been quoted in the remarks in this brief, on the "History of the Art," (see pp. 8) show unmistakably that the tires are secured by the well known mode, viz., by rivets passing through the tire and rim of the wheel.

(2). Proceedings of Institute of Civil Engineers.

This is the Twenty-third Volume, issued according to the imprint, in 1864, in London, and is one of a series of volumes containing the minutes of the proceedings of the Society. Plate 8 is referred to by the appellants as showing the patented device; but it is far from having even a semblance of it. Fig. 4 is stated to be an "engine spring-tire," and Fig. 5 a "wagon washer-tire." The former is a double flanged or grooved tire, with a recess in the groove into which tallow is poured; between the flanges forming the groove a ring of steel to form a spring is placed, and inside the spring, and bearing against it, is the wheel-centre, the periphery of which is conical, and is secured on one side by a ring, and on the other side by a hook which is a curved or bent portion of one of the flanges of the tire. Indeed, the object was not to shrink or place the tire solidly and securely on the wheel; but to make an elastic wheel, which would "slip within the tires." This design is clearly set forth in the text accompanying the plate (see pp. 33 and 34 of supplemental record); and the wheel and tire described, instead of being a tire rigidly attached to a solid wheel-centre by shrinkage, and secured in its place by a single flange without the use of bolts, is a wheel and tire with a spring between them, "to produce an elastic resilience immediately over the tire, beneath the wheel," and in which the wheel is intended to slip

round within the tire; and the latter, besides that, is not secured on the wheel by a single flange between them, but is made "with a deep front rib, and a false rib or flat ring in a groove at the back." The mode of application is thus explained in the exhibit: "The wheel was forced in on the steel hoop by the pressure of two bolts, each one inch in diameter, and the flat ring was sprung into its place with elastic expansion."

(3). KRUPP'S "BOOK," EXHIBIT G.

1. The title-page of this exhibit is in three languages, and, in German, decribes the contents as "Profil-Zeichnungen;" in English, as "Sections;" in French, as "Profils." The full English title-page is as follows: "Section of patent cast-steel tyres, with-"out a weld, supplied from the Cast-Steel Works of "Fried. Krupp, at Essen, Rhenish Prussia, 1862." It is not stated in terms on the title-page that the tires are for use, or exclusively for use, on steam-power railroads. It is scarcely necessary to remark that there is a difference between a drawing in profile and a drawing in section. The former only represents edges by lines; it is an "outline or contour;" Webster's Dictionary, *sub voce;* or "a contour viewed "from one of its sides," Worcester's Dictionary, *sub voce;* the latter is a "representation of anything "as it would appear if cut through by an intersecting "plane," Webster, *sub voce.* The terms descriptive of the character or nature of the drawings, of which the book is composed, are therefore inconsistent with each other, or discordant.

2. No name of any author or publisher appears on any one of the title-pages. The date printed on the title-pages is 1862, but the exhibit is not stated on its face to be published either by Fried. Krupp, or at Essen, although it purports to represent profiles or sections of tires supplied by him from the Cast-Steel Works at that place. So far as directly appears on its face, it is anonymous. No one is named as responsible, either as author, compiler, or publisher, for its truthfulness or accuracy; nor is any place of publication or issuance stated. It may have been issued in any land or country where either the German, the English, or the French language is spoken or printed.

3. There is no continuous or consecutive paging, or, in fact, any paging at all of the sheets which constitute the exhibit. It was quite possible therefore, to add new pages, or to withdraw old pages from time to time, in successive editions or issues of the collection of sketches, and the date on the title-pages does not therefore *prima facie*, identify each and every particular page as of the year 1862. Presumptions of strict accuracy and regularity cannot always be applied to advertisements, sample books, show cards, circulars, &c., of manufacturers, or of the makers or venders of goods, products, and merchandise. They are not affected or bound in any way by the conventional rules, usages, or obligations of the regular book trade.

4. The title-pages state that there is a patent con-

nected in some way or other with the devices represented in the drawing. Whether the patent relates to the production of the cast-steel of which the tires are formed, or whether it relates to the manufacture or configuration of the tires, is left uncertain. The language of the German title-page is "Patent Gusstahl-Radreifen," that is, "Patent-Cast-steel-Tyres." The English title-page is "Patent-Cast-Steel-Tyres." The French title-page is "Bandages brevetés en acier fondu," that is, regarded literally, "Patented Tyres in Cast-Steel." It is therefore uncertain, apparently, whether the patent applies to the tires or to the cast-steel. In either case it is evident that a patent is an element in the devices represented in this exhibit. The patent is, of course, better evidence than a mere profile sketch or a section. The patent, however, is not produced, nor is any information given concerning it. The patent systems of all countries require a written description, more or less extended, of the thing patented. In the absence of the patent relating to these tires, it is impossible to comprehend their full scope, operation, or significance. It is respectfully submitted that an American patent cannot be invalidated by a device patented in a foreign country, unless the patent itself be produced in evidence. It is only because the foreign device is patented that it is regarded as an anticipation.

5. The Exhibit contains no description of the devices, or of any of them. It does not purport to

contain a description. It purports only to be Zeichnungen, sections, or profiles of a portion of a tyre; that is to say, only drawings, sections, or profiles. A description is "a sketch or account of anything in words; a representation in language; an enumeration of the essential qualities of a thing or species; a recital, a report:" Webster, *sub voce*. The Act of Congress requires that the description, where the device is not patented, should be contained in a printed publication; its words are "described in a printed publication." Statutes at Large, Sec. 4923.

6. The drawings purport to represent only a part of a single tire; they do not represent the whole tire or the wheel-centres, or the conjoint wheel and tire, or the position of the wheel on the rail, or the organization of a system of wheels, axles, and tires, as combined together in actual use, and in position under a locomotive. They do not even disclose the manner in which the wheel and the tire are attached or united together. There is nothing in the profile drawings or sections inconsistent with screw bolts, rivets, or other analagous devices for the attachment of the wheel and tire to each other, or which excludes such devices. The pictorial section which constitutes the drawing, if it were taken through the screw bolts or other such devices, would disclose those modes of attaching the wheel centre on the tire. If the section were not taken through the screw bolts, it would not disclose them. The drawings are not inconsistent with the use of screw bolts, &c. Such bolts may have been

used in these tires; their use or presence would not be necessarily indicated in a profile drawing, or by a section which was not made to pass through the bolt. The wheel centre may, in fact, have been a compound wheel centre. The profile sketch does not enable us to look down upon the tire, or to look around it, or otherwise to ascertain from an examination, either of its outer or of its inner surface, whether it is pierced or otherwise adapted to receiving screws, bolts, nuts, &c. No mode of attachment, complete both in what it includes and excludes, is indicated or suggested by the mere boundary lines or threads which constitute a profile sketch.

7. The Exhibit gives no information concerning the tires, except that they are "patent cast-steel-tires without a weld." It was apparently no part of the object of the Exhibit to describe the configuration of the tires, or to state any fact or function concerning them other than that one or more patents was or were concerned in their production, that they were made of cast-steel, and were without a weld. No attention is called, and none is directed to any other feature. The configuration of the tires, or their utility or special function, in any particular case or cases, is altogether unimportant as respects the professed purpose aimed at by the Exhibit, and is only subordinate and incidental thereto.

8. The only information which, in terms, is given by the exhibit in connection with the tires, is the

statement that "the sections show the natural size. "The sections marked *a*, are taken from the rolled "tires, and those marked *b*, from the ready turned "tires." Some of the sketches contain the word "locomotive," some the word "wagons," some the words "locomotive and tender," one at least is marked "tender," another is marked "wagons and tender," and many contain no mark whatever of this sort. Some of the pages contain what apparently purport to be the designations of certain railroads, other pages seem to indicate machine shops or foundries, other pages contain what are manifestly the names of individual persons, or of firms. The various uses thus indicated, may have been quite diversified, including mines, foundries, shops, horse railways, tramways, &c. There is nothing on the face of the exhibit which indicates or specifies the nature or character of the use, its duration, or its result, or whether the use was experimental or otherwise, or whether it was a successful use. Indeed, it is not disclosed by the exhibit whether there was any use whatever, in point of fact, of the tires in manner and form as sketched. The exhibit only states that the tires were "*supplied* "from the cast-steel works of Fried. Krupp." It does not necessarily follow that the tires were applied to the wheel-centre in the precise form in which they were supplied by Krupp, for the evidence shows that it was the custom of railroad machinists to bore out tires to the particular form preferred. Defendant's witness, William Toothe, who, from 1861–'2 to 1869,

was with Thomas Prosser & Co., of New York, agents for Krupp's Steel Works, says: "from the "parties who sent us orders for tires, we always re- "ceived and delivered to them the tires in the rough "state." The same witness says he never acted for Prosser or Krupp in Europe, and he adds: "I have "no personal knowledge of the use of the tires de- "scribed in that book, or the respective railroads "mentioned therein." (Printed Record, pp. 30, 31.) There is no evidence, *per testes*, or otherwise, of the actual foreign use of the tires, in the form and shape delineated; and if the book be relied on as constituting presumptive evidence of such foreign use, it may be just as misleading as it is when taken in connection with American use; for notwithstanding the exhibit, Mr. Toothe says: "there were no tires imported "with the fillet except the specimen I have spoken "of. We never took any orders for any tires with an "internal flange or fillet. * * * From the parties "who sent us orders for tires, we always received and "delivered to them the tires in the rough state, that "is, perfectly plain on the inner surface." (Printed Record, pp. 30, 31.)

There is no parol evidence which fully explains the exhibit, or the German and French title pages, or the meaning or applicability of the words marked on the particular pages. Page 123 of the exhibit is particularly referred to by the defendants below. Printed Record, page 14. The page of the exhibit thus referred to contains the words "Bairische Ost-

bahn, München," and the figure there represented is marked with the words "Waggons and Tender." The figure is not marked with either the letter *a* or the letter *b*, to indicate whether the section is taken from a rolled tire or a ready turned tire. Defendant's witness, William Toothe, says, "Those not marked "with either letter, I should think, would be in the "rough; I can't tell, but I should think so." Printed Record, p. 31. Defendant's witness, Philip Hofecker, was referred to the same page of the exhibit, and asked what he understood by the words "wagons and tenders." He replied, "I should suppose 'tenders' meant the car carrying water and coal that follows "the engine; I should suppose the words referred to "the tires; if not, I don't know what they referred to." When asked what the word "locomotive" and the word "wagons," found on other pages of the drawings, referred to, he says, "I suppose to 'locomotives,' "and to whatever they call their 'wagons.'" Printed Record, page 15. There appears to be no other attempted explanation of the verbal contents of the exhibit. But even if the words on the pages of the exhibit were adequately explained in a literal sense, it would seem requisite that there should also be evidence identifying or showing the external thing, existing *in pais*, which constitutes the outward embodiment of the terms used, for it does not follow that the same word always, and in all places, means the same thing. See Bischoff *vs.* Wethered, 9 Wallace, 816.

10. The fact that the exhibit appears to represent such a heterogeneous collection of slots, shoulders, fillets, hooks, mortise-joints, dove-tails, tongues, and grooves, indicates the absence of any one simple uniform principle, and may justly be regarded as disclosing only attempts, in various experimental ways, based upon want of knowledge, or upon conjecture, or supposition, or upon a desire to make practical tests, and thus by various tentative efforts, to seek for the solution of a problem recognised to be necessary and important.

11. It is furthermore respectfully submitted, in connection with this Krupp Exhibit, that a mere drawing, unaccompanied by a description, is not admissible as an anticipation of a patented invention. In the Corn Planter Patent, 23 Wallace, 206, the Court, speaking of an English Patent, said: "No method is described "for covering the seed or pressing it in the ground. "The side view of the coulter, exhibited in the draw- "ing, bears some resemblance to the runner in Brown's "machine, but we have no other description of it, or "of the manner of its operation." Notwithstanding the resemblance admitted to exist, the drawing was disregarded because there was no other description of it, or of the manner of its operation. In Seymour *vs.* Osborne, 11 Wallace, 555, drawings and a description are coupled together, and it seems to be assumed that the drawings are accompanied with a description. The language of the Court is as follows: "Patented

"inventions cannot be superseded by the mere intro-
"duction of a foreign publication of the kind, though
"of prior date, unless the description and drawings
"contain and exhibit a substantial representation of
"the patented improvement in such full, clear, and
"exact terms, as to enable any person skilled in the
"art or science to which it appertains, to make, con-
"struct, and practice the invention to the same prac-
"tical extent as they would be enabled to do if the
"information were derived from a prior patent." In the view of the Court it would seem that a patent granted cannot be displaced or overthrown by a foreign publication, unless such publication contains drawings and a description, and unless such drawings and description are as full, clear, and exact, as a prior patent. The publication must be substantially equivalent to a prior patent. Unless, therefore, the drawings are accompanied with a description, they would not, of themselves, be the equivalent of a patent, or convey as much information as would be imparted by a prior patent.

In Ellithorpe *vs.* Robertson, 2 Fisher's P. C., 85, it is said by Ingersoll, J., that "to defeat a patent
"which has been issued, it is not enough that some
"one, before the patentee, conceived the idea of effect-
"ing what the patentee accomplished. To constitute
"such a prior invention as will avoid a patent that has
"been granted, it must be made to appear that some
"one, before the patentee, not only conceived the idea

"of doing what the patentee has done, but also that he "reduced his idea to practice, and embodied it in some "practical and useful form. The idea must have been "carried into practical operation. The making of "drawings of conceived ideas is not such an embodi- "ment of such conceived ideas into practical and "useful form as will defeat a patent which has been "granted."

In Judson *vs.* Cope, 1 Fisher's P. C., 619, it is said, by Leavitt, J., "I should hesitate very much to accept "a mere drawing unaccompanied by any description "whatever."

A drawing does not prove or demonstrate that the machine drawn would be practically successful when actually constructed and used. The same may be said of models, and Justice Clifford, in the Circuit Court, in Calhoun *vs.* Ring, 1 Fisher's P. C., 399, applied similar principles of reasoning both to models and to drawings. In his charge to the jury, page 408, he said: "Two of these machines, namely, the "S. S. Hogle and Glandy Moody machines, ought also "to be considered by you in another point of view, "which I will now proceed to state. In respect to "those machines, you are instructed to inquire whether "either of those persons made an operating machine, "or whether they only made models or drawings from "which machines might be constructed. If the latter "only were made, and although such models might be "capable of operation for the purpose of experiment,

"yet unless it is proved to your satisfaction that a "machine or machines capable of being used for actual "agricultural purposes, was or were made prior to "Cahoon's invention, then, as a matter of law, I in- "struct you that such alleged inventions never were "completed, and cannot affect the validity of Cahoon's "patent."

The same view with reference to models was expressed by Swing, J., in The Stillwell and Bierce Manufacturing Company *vs.* The Cincinnati Gas-Light and Coke Company, 7 Official Gazette, 829. His language, page 833, is: "If the making of the "model constituted invention, I should hold that the "proof established the fact that James Armstrong "[who was alleged to have made the model] was the "prior inventor; but that does not constitute inven- "tion; it can only be used as an item of testimony "reflecting upon the making and using of the wooden "heater [*i. e.*, the device alleged to be represented by "the model] in 1845 or 1846."

Giles, J., in Johnson *vs.* McCullough, 4 Fisher's P. C., 170, expressed a similar opinion on page 175, saying: "I have also examined all the testimony re- "lating to the Shaw model, and find that it does not "show more than the making of a model, and not of "any practical working machine, which is necessary "to overthow a patent."

It has been held by Judges McKennan, Blatchford, and Sheply, that even drawings and models, which

have been submitted to the Patent Office in prosecution of a withdrawn or an unsuccessful application for a patent, are not of themselves such a reduction of an invention to practice, or such an embodiment of invention as to invalidate a subsequent patent.—The Lyman Ventilating and Refrigerating Co. *vs.* Newell Chamberlain *et al.*, 10 Official Gazette, 588. Indeed, these rulings seem to be justified, if not required, by what had been previously said by this Court in the Corn Planter Patent, 23 Wallace, 211, viz.: "The mere "fact of having unsuccessfully applied for a patent "therefor cannot take the case out of the category of "unsuccessful experiments." As against a subsequent patent, such a case is one of experiment, although it includes a description, a drawing, and a model.

It is therefore submitted respectfully, that in view of the preceding considerations, the Krupp Exhibit cannot have the legal effect of overthrowing the patent here in controversy.

This conclusion, arising from an examination of the Exhibit itself, is not affected or prevented, if reference is made to the parol testimony concerning it.

(4). KRUPP'S LARGE TIRE.

It was also sought, by the defendant below, to disprove the originality of the plaintiff's invention, by evidence relating to a certain tire in the City of New York. William Toothe, a witness for defendant, was asked as follows: "Look at the drawings attached to

"the plaintiff's patent, and state whether, prior to its "date, you saw any tires embracing, substantially, "the plaintiff's claim?" His answer was: "Yes, "sir, I did; in 1861 or 1862, we had (Prosser & Son) "a tire sent by Krupp to the New York agency, and "the tire has the identical fillet on, which is the "claim of Mr. Mellon; by fillet I mean the project- "ing flange on the face of the tire." (Printed record, pp. 30–31.) He proceeds to state, on the same page, that "this tire was first placed at the front door of "Prosser & Son, Platt street, New York, so that "every one entering the store had to walk through "it; it was of extraordinary size, being somewhat "over eight feet in diameter; it is now in 15 Gold "street, fastened on the Platt street side of the build- "ing, in the wall; the tire was first exhibited at "Platt street, before the door, in 1862; it was open "and uncovered; every one could see the fillet. It "was used as an advertising card, being unusually "large." He further says, "the tire was received "before I came to Prosser's. I don't know that it "came from Krupp, except that he spoke of it in his "letters to the firm; speaking from recollection of the "letters of Mr. Krupp, I should say that he said the "tire was rolled in 1850 and exhibited in 1851. The "correspondence with Mr. Krupp about the fillet or "flange, was after Mr. Mellon's patent was taken out. "* * * It is not a working size for use in this "country." It is not claimed by the witness that this extraordinary advertisement was ever used as a tire, or

that it could be so used, or was intended to be so used, or that it was in any sense a practical device, or designed to be such. It indicated no mode of attachment to any particular kind of a wheel-centre, nor is it explained how the fillet came to be there. It may have been regarded as an ornament, or as moulding, or it may be connected with some matter of convenience or facility, in rolling or dressing up the tire. As the witness says that none of Krupp's tires were imported with a fillet, except this particular specimen, there is an increased probability that some special circumstance occasioned the fillet in this instance. It was not a practical working device. It did not necessarily suggest the features of the plaintiff's invention. No witness testifies that it was capable of being attached to a wheel, or if so, in what way it could be attached, or that even then it could be safely used. It was evidently intended only to be exhibited as a huge advertisement of the ability of Krupp's establishment to handle large masses of metal. It certainly was not a prior user of Melon's invention by Prosser, nor did it impart to the public the knowledge or information contained in his specification; or, of itself, enable the public directly, and without trial or experiment, and without further inventive or constructive effort, to put in practice the plan of tire-retention set forth in the patent. It is scarcely even an abandoned experiment, for there is no evidence that any one thought it worth while to attempt an experiment with such an exaggerated device, even if experiment with it were possible.

5. KRUPP'S (PROSSER & SONS) CIRCULAR.

It was testified by the witness William Toothe, page 32 of record, that Prosser & Sons, as agents for Krupp in the sale of his steel tires, "had a printed form of instruction as to how to put on the tires from Krupp," which they sent to customers with every invoice. "They were instructions with regard to shrinkage," relative to allowance to be made in boring out the tires; for, as the witness testified, page 31, "we never took any orders for any tires with an internal flange or fillet. * * * "We always received and delivered to them the tires in the rough state; that is, perfectly plain on the inner surface." This circular might be disposed of with the remark that it is not a printed publication within the meaning of the Act of Congress; but if it was, it does not affect the validity of the Appellees' patent, for several reasons: There is no proof of its publication, or rather issue, excepting only by the witness Kinsey, who states, page 33 of record, that he received it from Prosser & Sons, between May and September, 1865, with the tires purchased, which were put on the engine "E. A. Packer," in October, 1865.

Publication does not consist in printing a letter of instruction, and sending it privately to a private person for private use, and if it did, it was too late in point of time, for the appellee's specification bears date September 9, 1865. The circular was not issued to describe a mode of securing tires, but only and

engines, or both, is not stated, except inferentially from the use of the words "engine wheel" in reference to Figs. 1 to 9, and the words "carriage wheel" in reference to figures 10 and 11. It is stated in the Appellant's Answer to be a patent for "car wheels." It is not at all improbable that at the date when that patent was issued—1853—wheels constructed on the same principle might have answered for both cars and engines; but their engines were of comparatively light weight, and the cars (English) drawn by them were more like carriages, and very different from the cars now in use in this country. However they may have been interchangeable at that time, no one would attempt to assert that a car wheel as now constructed could be applied successfully on the heavy locomotive engines in use at the present time. In a preceding part of this argument it is shown that a wheel to be at all useful under a heavy locomotive engine must have (1) a wheel-centre of *solid* metal, *i. e.*, cast in one piece, as distinguished from one made up of parts or sections; (2) a rim or tire of metal having great tensile strength, which will bear heavy strains, and not wear or stretch; (3) that shrinkage shall be used as an element in any and every mode of attaching or securing such tires.

At the date of the plaintiff's patent, as well as at all previous times, the liability of the tire to become loose and come off the wheel was a subject for careful consideration in constructing the engines, and various devices have been used for that purpose. With light

engines of former years it was possible to use compound wheels, *i. e.* wheels made in parts or sections, and it was then a comparatively easy matter to secure the tire by making the wheel or tire with a double flange, one on each side of its face, which is the equivalent of a groove; and building up within it a wheel with a tongue or rib on its periphery, the whole being fastened together by bolts sometimes passing laterally through the flanged sides of the wheel or tire, but such double flanged or grooved tires or wheels could never be used where the tire was to be *shrunk* upon the wheel, for the reasons already stated, nor could shrinkage be used with a compound wheel made up of sections or segments. The necessary consequence was that when, in course of time, it was required for heavy engines to use a *solid* iron wheel, the tire was made plain on its inner surface in order to be able to *shrink* it on the wheel-centre, and rivets or screws were resorted to as a fastening device.

The patent to Wharton is for "improvements in fixing tires on wheels in such manner that should the tire get loose, or break, it is prevented from flying off." It is one of the grooved tires above referred to, and is put upon a compound wheel, for the patent says, "this wheel is made in two halves, as shown in figs 2, 3, and 4, for the purpose of securing firmly between them the tire (c), which has a dovetail rib (B) formed round the internal circumference in the middle of its breadth." Bolts or rivets to bind the parts of the wheel against the dovetail rib of the tire

solely, as and for a guide to the proper allowances to be made for shrinkage with steel of Krupp's make, as admitted by the witness Toothe. There is a clause, however, at the end of the circular, which recommends the operator to "turn a stop or fillet upon the tire, with a corresponding recess upon the wheel, on the outside; *and rivet the former over the latter, upon the inside. If, however, screw bolts are preferred, they should be screwed into the rim of the wheel, leaving a plain pin only, about half an inch long, to enter the tires.*" The appellee's patent does not require any "corresponding recess upon the wheel," into which is to be fitted a stop or fillet turned upon the outside of the tire; and in view of the language of this circular, here quoted and italicized, can it be claimed for a moment, that there is, therein, made patent and published to the world, that a tire can be shrunk on a solid wheel, and secured in its place by a single flange between the wheel and tire, so arranged, that in connection with the usual flange on the tire, it will hold the latter upon the wheel, *without the use of bolts, screws, or rivets.*

THE PRIOR PATENTS.

(1). Wharton's English Patent.

The appellants offered in evidence before the Examiner, in the Court below, an English Patent, granted to Emanuel Wharton, in 1853, for Railway Wheels. Not a syllable of explanation nor proof was offered to show what connection it had with the questions at issue, nor wherein the devices described in it either differed from or were similar to the appellee's invention; or whether it was offered to show want of novelty, or merely to show the state of the art. It is respectfully submitted, that it is not permitted to a defendant to offer an alleged prior patent without calling witnesses to explain it, and ask the Court to take notice of and construe it to defeat the plaintiff's patent. Such prior patents are as much the subject of expert proof as to their contents as are prior machines; Bischoff *vs.* Wethered, 9 Wallace. On examination of this patent, however, it appears clearly to describe and show a wheel so impracticable for railway use in the present advanced state of the art, that it was impossible to believe that it was offered for any other purpose than as a part of the history of the art. It is entitled an improvement in "railway wheels," but whether intended for railway carriages or for railway

are inserted laterally through the wheel-centre, as seen in figs. 3 and 4. There are several modifications shown and described in this patent, and the above description applies only to figs. 1 to 4. The wheel shown in figs. 5 to 9 is a spoke wheel, and to attach the tire to it two dovetail ribs are used, one on the wheel on one side of it, and the other on the tire on the opposite side, fitting into corresponding dovetail mortices; this is a dovetail locking device, for, as the patent says, "thus the dovetails lock one into the other." It is not all clear whether the wheel in figs. 7 and 8 is made in two parts or not; at any rate the felloe or rim seems to be separately constructed, and on it the tire is put. The patent directs that the tire be heated and allowed to cool on the wheel, but this does not mean shrinkage in the sense it is now used with respect to locomotive engines any more than does the well-known and ordinary work of shrinkage of a hoop tire on a carriage or wagon wheel mean the same thing. Indeed, if a shrinkage as now used was practiced with Wharton's wheel, the dovetail ribs or tenons could not be fitted into the corresponding recesses or mortices intended to receive them. To explain the construction of the wheel more fully, the patent says, "Still adhering to the principle of dovetailing * * * * * * "this I accomplish by forming a rib (E) on one side of the internal periphery of the tire (C), and another rib (F) on the outer periphery of the felloe (W). Each rib has one of its sides turned to a dovetail

form, of a suitable angle, * * * * and fitting, when put together, in a corresponding dovetail on the felloe or tyre, as the case may be." And this rib (G) is formed on the tire as a projecting piece, and hammered down when the tire is in place. Or, to use the language of the patent, after the tire is heated and placed upon the felloe of the wheel, the double dovetail projections fitting into the corresponding dovetail recesses, "the small rib (G) is then clenched or riveted down, as seen in Figures 6, 7, and 8, or the cavity between the ribs (G) and (F)—see Figure 9—may be filled with any suitable hard metal, instead of clenching or riveting the rib (G)." It is respectfully submitted that sufficient has been said of this patent, and the improvement described in it, to show conclusively that it does not describe a mode of securing tires at all practicable with locomotive engines of the present date; and that it does not make patent to the public the discovery that a single flange, so arranged between wheel and tire, that in connection with the usual flange on the tire, will keep the latter on the wheel; and which, as a securing device, is applicable to *solid* wheels, upon which a heavy metal-tire, smaller in internal diameter than the periphery of the wheel-centre, is to be shrunk upon it.

(2) HODGE'S PATENTS OF 1851 AND 1852.

The first of these patents, both granted by the United States government, and both in terms for "railroad car-wheels," was offered in evidence by the

appellants, defendants below. It is the same patent referred to in the disclaimer clause of the specification of appellees' patent. No testimony was offered concerning it, but it was put into the case by the defendants below, evidently for any purpose for which it might be found useful on the hearing. The appellees, however, offered the second patent to N. Hodge—that dated in 1852—as explanatory of the first one; and also called a witness, a mechanical, though not a scientific expert, to explain the patent of 1851. This witness, William C. Conwell, testified, page 26 of record, that he was foreman of the turning shop of the Delaware, Lackawanna, and Western Railroad, and had been acquainted with the mode of attaching tires to wheels of locomotives for twenty years. He also testified, pages 27, 28, and 29 of record, that he had read Hodge's Patent (of 1851, Exhibit B), and was requested to state if the invention therein described was similar in any respect to the invention described in the complainant's patent; and his reply is full and explicit: "I can find no similarity in any point in the inventions, neither in principle of construction, mode of operation, or objects to be attained or accomplished." And in reply to a question to state in detail the difference in principle of construction between the two inventions mentioned, he answered, pages 27 and 28 of record: "Mellon's invention consists in the providing of wheel-centre * * * [or the tire,—see page 28 of record] * * * with a single flange, so arranged, that in connection with the external or

usual flange on the tire, it will keep or retain the latter on the wheel; Hodge's invention is a novelty in the construction of car wheels, and has no reference anywhere to the securing of tires; Mellon's wheel-centre is in the form of a cylinder; the outer periphery of Hodge's segments, which form a part of his wheel-centre, is in the form of a cone, with an annular groove sunk in them, or with two flanges; a cylinder is not a cone, neither in geometry nor in mechanics, and the one will not answer where the other is required; Mellon's single flange would not secure a tire on a conical wheel; and you could not put Hodge's tire on a wheel with a grooved periphery, unless that wheel was capable of being contracted and expanded in the manner described in Hodge's Patent papers; an elastic wheel, such as Hodge describes, would be useless for carrying purposes on a railroad. Hodge claims in his papers that his wheel will yield to pressure in every direction; one direction would be perpendicular, or downward onto the axle; the weight of the car and its load would compress the rubber segments or ring below the axle, allowing that above to expand, and compel motive power to force the greater elastic bulk above the axle through the less space below the same."

And further on, in reply to the question as to utility, or rather practicability, of Hodge's device, the witness said, page 28 of record: "I think it is not practicable; I am strengthened in that belief from the fact that it has never come in general use; I

never saw one in use myself, nor did I ever hear any one say they did; I have already described the mode of operation of Hodge's wheel, and was about to answer the last part of the question—the point of utility; we could not turn up the tire on a wheel such as Hodge describes, because of its elasticity, and wheels for locomotives must be turned up true after having been in use." * * * * * "In case of Mellon's improvement it is more readily taken off than a tire secured by any other device, because there is nothing in the way except its own shrinkage, and if broken or loose, even that is removed; we can repair or replace a tire with Mellon's improvement without taking the wheels from under the engine by simply raising the flange above the rail, and then take it off; if Hodge's wheel became loose from the tire it would break off his outside flange, allowing the segments, both metal and rubber, to fly off; in short, the wheel would go to pieces and the engine have to stop; if Mellon's tire became loose from the wheel there would be no such effect; it would not cause the stoppage of the engine or break the tire or the wheel, if not run unnecessarily long in that condition; I have known engines run two weeks with the tire loose, Mellon's improvement being on; I have known them to run a hundred miles with the tire broken."

Attention has already been called to the fact that the tire rises in the centre from use [see drawing of such a tire, Exhibit Lisk, page 19, of record], and the

witness Conwell was asked, what would be the effect on Hodge's wheel in such case. He answered, page 29, of record, as follows: "If the (Hodge) tire rose in the centre, it would have the effect to break or crush one, or perhaps both flanges on the wheel, or rather the segments of the wheel, by concentrating the weight on them; such would not be the effect with Mellon's wheel and tire if properly constructed."

A very brief review of the Hodge specification will prove the correctness of Conwell's explanation. Referring to the drawings of the patent, Hodge says, "the wheel is made in not less than two concentric parts, and connecting these parts by vulcanized india rubber or other analogous elastic material interposed between them. * * * It consists of a body A, and of a rim B of metal, which are connected by an annular cushion of vulcanized india rubber C, surrounded by a series of annular segments D of metal." The object of the invention as stated in the opening clause, and also in the claims, is to make an elastic wheel "that will not transmit vibrations from the rim to the centre or axle of the wheel, whether such vibrations be lateral or radial in direction." The second patent granted to Hodge, in 1852, recites the former patent, and is for an improvement on it, in "the manner of constructing the segmental ring and keys for the purpose of facilitating the insertion of the ring or band of india rubber, or other analogous elastic material, and of confining said segmental

metallic ring in its place, as the means of fastening and holding the wheel firmly together."

It is not necessary to pursue the examination further; sufficient has been said in explanation of these patents to show that in neither of them is the appellee's invention either shown or described, in whole or in part.

In conclusion, it is urged, that the great utility of the appellee's invention, as stated and shown, is, apart from the proofs in the cause, almost conclusive evidence of its novelty. And besides, that up to the time of the final hearing in the Court below, the validity of the appellee's patent and his exclusive rights thereunder has been acquiesced in by the Delaware, Lackawanna and Western Railroad Company, and the Dixon Manufacturing Company (extensive builders of locomotive engines at Scranton, Pennsylvania). The prior patents and publications, apart from the parol proof, show that the great advantages secured to the public by the appellee's invention were desiderata sought for many years to be obtained. No living witness, other than Kinsey and Hofecker—both in appellant's employ—was called to prove want of novelty. If it had been previously known and used, would there have been any dearth of evidence to prove that fact—especially in Philadelphia and Pennsylvania, the centre of several of the largest and best equipped railroads in the United States?

THE PAROL PROOF AS TO ALLEGED PRIOR USE.

But two witnesses were examined in support of this branch of the defence, and they were both in the employ of the appellants; one, Philip Hofecker, a master-machinist, the other, J. I. Kinsey, also in the same department. Their testimony failed to support the proposition. Philip Hofecker stated (page 14 of the record), that they—the appellants—"first used the shoulder on May 26, 1864, on the engine Pacific, * * it seems to me there came a cut or drawing showing this shoulder on a tire accompanying a set of tires purchased from Krupp in Germany; see page 123, Krupp's book." But the whole force and effect of this statement, as respects the date mentioned, are lost by the admission of the witness on cross-examination, page 15 of record, that he testified from a memorandum book, the entries in which were copied from the original book, the entries in which latter were made by somebody else; that the *original* book is in existence, "and can be produced at any time," and lastly, that there is nothing in the book to indicate that the tire was made with a flange or shoulder, except the words "Krupp's steel tire;" "that the tire came plain, that is, perfectly parallel with the centre." It appeared from the proofs in the cause, that the appellants used many of the Krupp steel tires, from time to time, and that they all came plain, that is, without flange or shoulder. Chamberlain, treasurer of Appellant, testified (page 16 of record), that the tires re-

ferred to by Hofecker, were the *first* of the Krupp tires used on the road. The same witness, Hofecker, when examined before the Master, testified (page 73 of record), "the *first steel* tires we put on by *shrinkage alone* was in 1864. We put on all by shrinkage alone since the fall of 1874," (the date of the decree in this cause). The original book referred to is not produced, nor any book. Alexander Mitchell, the Superintendent of the Wyoming Division of the road, H. Stanley Goodwin, the Assistant General Superintendent of the main road, and L. Chamberlain, the Treasurer, were all examined in the cause, and none of them attempted to corroborate this witness as to his dates, nor were they even interrogated on that point. The appellants did, however, call J. I. Kinsey, the other master-mechanic, to testify as to the first use of the patented device on the road, and *he* testified (page 29 of record), that it was in September, 1865, although when testifying before the Master, he stated (page 76 of record), that they "had used Mellon's device since October, 1865," and again on page 33 of record, he gives the name of the engine, the "E. A. Packer," and October, 1865, as the date when the tires were put on; and this would seem to be correct, as it corresponds with the date given for Engine No. 11, in table of engines, Exhibit "A," on page 37 of record. The record contains further corroborative proof that October, 1865, was the date when the appellants first used the patented invention. On page 37 of record, in tables A and B, of appellants' engines

having the patented improvement on the wheels and tires, under the column entitled "date when *first* so provided," the earliest date found is October, 1865, being engine No. 11, which, by reference to table B, is found to be the "E. A. Packer," referred to by Kinsey. A reference to same tables A and B, discloses the fact that engine No. 8 is the "Pacific," and the date of putting on her tires is stated as "January, 1867." A reference to page 14 of record, shows that this is the same engine—the "Pacific"—referred to by Hofecker, as the engine on which he says he put the tires with the square shoulder, but the date of so doing, he erroneously gives as May 26, 1864, instead of the date on the company's books, January, 1867. This may explain why he was not corroborated as to his dates by any of the officers or employees of the company. This discrepancy between the dates was discovered by the appellants when the cause was before the Master, and they attempted to rectify it by calling Hofecker "to correct the exhibit." His explanation was that May, '64, was the right date, but they had rebuilt the engine in January, 1867. No doubt the witness was honest in his intention to state the truth, but he was mistaken. He said before the Examiner that he testified from a memorandum book, copied from the original book made by somebody else. We have seen that the books of the company give January, 1867, as the date when this engine was *first* supplied with tire having a fillet or flange. Besides that, Hofecker said that there was nothing on the memorandum book

to show that the tire had a flange; that it just said Krupp's steel tire; and that at that time he saw a copy of Krupp's trade book, which came along with the tire. Between that date and the date he testified the company had applied over five hundred of these tires on ninety-one engines. It is not at all unlikely that he applied a Krupp tire, which was plain on its inner surface, to the engine Pacific sometime in 1864 or thereabouts, as he elsewhere says, as already quoted from p. 73; that he did put on steel tire by *shrinkage alone* in 1864; and they were the first *steel* tires he put on. In view of the fact that the company kept a full and accurate account of all the patented tires put on by them, beginning with the one referred to by Kinsey as the first, in October, 1865, together with the dates when so put on, the length of time run, the names of the engines on which they were placed, and even the thickness of the tire when first applied, we are entitled to assume if they had begun as early as May, 1864, to use such tires, we would have had in this case such a record of it produced. The absence of such evidence is accounted for, however, by the admission of Hofecker, that his memorandum book, from which he testified, was copied from an original book, in the handwriting of another person; but the exhibits, tables A and B, produced by the company from their books, give January, 1867, as the date of applying the flanged tires to the engine Pacific, and no doubt the record date is the correct one; at any rate it is to be taken as such, in view of the admission of

the witness that his testimony is founded on an unproduced memorandum, said to be copied from the record. The answer alleges a use of the patented device by the appellants "more than two years before the grant of said letters patent;" and the learned counsel for appellant, in their brief (page 19), argue that the defendants made use of the patented device "more than a year before the patentee pretends that he made any invention." But neither the averment in the answer, nor the argument of counsel, are sustained by the proofs, which on this point consist only of the testimony of Hofecker, before referred to, and commented on, and which is contradicted by the very records of the defendants, from a copy of which the witness admitted that he testified.

In rebuttal of these proofs, the appellee Mellon, without going into the details of the conception and perfection of his invention, and its reduction to practice, but resting his cause on the bare statement of its perfection and practical application prior to September, 1865, offered in evidence the file-wrapper in the matter of the application for the patent in controversy, which showed that the application was signed and sworn to September 9, 1865, and was filed in the Patent Office of the United States on 6th October, 1865, which dates are prior to the first use of the flanged tire as stated by the witness Kinsey.

UTILITY OF THE PATENTED IMPROVEMENT.

At the date of the plaintiffs' patent, the driving wheels of locomotive engines had come to be made of large size, varying up to 5½ feet in diameter, and were of cast iron, in one piece, consisting of a hub, rim, and spokes; the outer periphery of the wheel-centre (as distinguished from the completed wheel provided with a tire) being perfectly cylindrical, and about 5 to 6 inches wide; the tire, which was then made of wrought iron or steel and weighed from 1,000 to 1,400 pounds, was cylindrical on its inner surface, and fitted perfectly the periphery of the wheel-centre on which it was placed. The tire was made slightly smaller in internal diameter than the wheel-centre, was heated until it expanded sufficiently to get it on the wheel, and clamps were used as a gauge to guide the tire to its true place on the wheel-centre. The operation was required to be performed with skill, in order that the edges of the tire should be on the same plane with the edges of the wheel; it was necessarily a rapid operation, in order that the contraction of the tire, by cooling, should not take place before the latter was properly set on the wheel-centre. This part of the operation being performed, rivets (in case of iron tires) were driven through the tire and wheel rim and hammered down; and in steel tires, set screws or nipple bolts were inserted through the wheel-rim and penetrated a quarter to a-half inch into the tire, to secure the

latter to the wheel-centre. To complete the wheel, several heavy plates or blocks of metal (called balance weights) were fastened between certain of the wheel-spokes, and bearing against the rim.

There were many objections to this mode of securing tires, the principal of which, as stated in the appellee's circular, pp. 46, 47, and 48 of record, were that if the tire became loose before it was worn out, as it frequently did from stretching and from errors in calculating allowances for shrinkage, and other causes, it was necessary to remove the tire and put on one that would fit, and in so removing the old tire, it was required "to disconnect the rods on both sides of the engine, and cut and punch out rivets, to unbolt and take out balance weights to get at some of them;" and "when an old tire is replaced by another old one, as is frequently done, all the holes must be drilled by hand at a great expense of labor." Furthermore, in the securing of tire by bolts and screws, "the wheel-rim is shattered at the bolt-holes by the shrinking force of the tire (which is over three hundred tons). When the tire stretches, the wheel reacts, and the points crushed by compression are separated by reaction and rendered entirely unsafe and unfit for use." To overcome these difficulties the appellee, Mellon, discovered that by placing a *single* flange *between* the wheel-centre and the tire, either upon the outer edge of the latter or the inner edge of the former, that the tire would be held firmly and securely on the wheel, even when the force of the shrinkage lost its hold.

The witness, William C. Conwell, of the Delaware, Lackawanna and Western Railroad, testified, pages 28 and 29, of record, "I have known engines run two weeks with the tire loose, Mellon's improvement being on; I have known them to run about a hundred miles with the tires broken." The appellee's invention may, at first sight, appear so simple as scarcely to be deserving the honor of that classification, but its chief merit, as will be seen on examination into its construction and operation, is alone its simplicity, by which the user is enabled to obtain valuable results both in an economical and humanitarian point of view. With a single flange placed *between* the wheel and tire, in one case placed on the outer edge of the tire, as in Exhibit C, and in the other case on the inner edge of the wheel, as in Exhibit B, the wheel stops or keeps the tire on the rail in both cases. The witness, Conwell, said, page 28, of record, "it is simply a transfer of the stop or shoulder from one side of the wheel to the other." The usual flange of the tire which guides and keeps the engine on the track is always on the inside of the rail and, of course, on the outside inner edge of the tire; therefore, the pressure of the wheel is outward and against the flange or shoulder intervening between wheel and tire, whether such flange or shoulder be upon the outer edge of the tire or the inner edge of the wheel; this principle of construction and operation is carried out to its full extent with a complete pair of wheels, with an axle between them, set on a pair of rails or track.

Having discovered this, it resulted that the use of bolts or screws to prevent the wheel passing through the tire, when the latter became loose on the wheel, could be dispensed with. It had before been attempted, without success, in case of solid metal and heavy tires, by using dovetail flanges, double flanges on wheel or tire, grooves on either to fit a tongued projection on the corresponding part, but these could only be used when the wheel was made *in parts*, as in the case of Wharton's wheel, and also Hodge's wheel, before referred to, and could *not* be employed when the wheel-centre was in one piece, and intended to receive a tire to be *shrunk* upon it; the reason is apparent, upon reflection, that with double flanges (which practically make a groove) the tire, which when in its place must be less in diameter than the wheel, would have to be heated sufficiently to expand it not only double the depth of the flanges, but something in addition, for it is to be expanded (in case of iron tires) one-thirty-second of an inch per foot of internal diameter, and is therefore to be that much smaller than the wheel-centre on which it is to be placed. The effect of heating a tire to expand it that much, and double the depth of the retaining flanges besides, would be not only to destroy it, but to render it so soft that it would assume irregular shapes when picked up with the tongues and attempted to be put upon the wheel-centre, and the effect of such a mass of white hot metal on the *cold* surface of the rim of a *cast-iron* wheel-centre, would be simply to

destroy the latter. Mellon's mode of attachment requires no such undue expansion, nor any more than the plain surface tire, and, indeed, not so much as the latter, for the flange assists the shrinkage to bear the strain arising from the lateral thrusts of the engine. When his tire is expanded sufficiently (one-thirty-second of an inch per foot of internal diameter for iron tire); and one-ninety-sixth of an inch per foot for steel; the tire is dropped on the wheel-centre and falls to the flange, which acts as a gauge, and a true setting is obtained, thus dispensing with the setting clamps before referred to, as used in case of plain surface tires, secured by bolts. With the heavy engines, large *solid* cast-iron wheels, and heavy steel tires, of the present day, no device for securing and setting tires that does not include *shrinkage* as a part of the mode of application, is at all available; it was to provide against the contingency of the wheel passing through the tire, when the latter became loose, by the stretching of the tire in use, and the force of the shrinkage lost its hold, that bolts and screws were inserted; and against this contingency in attempting to dispense with the bolts and screws, that engineers and others directed their endeavors to solve the problem; they all, prior to the appellee Mellon, seemed to have entertained the idea, that the tire should be secured on the wheel, on *both sides*, failing to see that a flange on *one side only*, properly arranged, *i. e.* on the outer edge of the tire, or on the inner edge of the wheel, was all that was necessary; for the

usual flange on the *outside* of the tire, being *inside* of the *rail*, and always bearing against it, would keep the tire in its place, and prevent it from moving inwards, when a pair of wheels and tires so constructed and arranged, with an axle between them, was moving on a track or pair of rails. Having made this discovery, and so solved the problem, the appellee, Mellon, was enabled to use the *solid* iron wheel; to retain the process of *shrinkage* in setting his tire, and also to dispense with the bolts or screws as a securing device. But this latter was not the only advantage derived from the invention. Clamps for setting the tire were dispensed with, for the flange acted as a gauge (and the appellants, defendants below, so used it to great advantage, as appears clearly in the record, see Master's minutes); and it is obvious that it serves as a most perfect gauge, enabling the tire to be set with great accuracy and precision. Instead of casting the wheel-centres with spokes, in order to drill the bolt-holes through the rim between the spokes, and then fasten on the balance-weights afterwards, the appellee's improvement enables the user to cast his wheels solid, or, as is now frequently the case, to *cast* the balance-weights in the wheel. Instead of having both wheel-rim and the tire weakened by large holes punched in them, they are left in their normal condition of strength and unbroken solidity. Instead of "disconnecting the rods on both sides of the engine, and cut and punch out rivets," when the tire becomes loose, it is only necessary to raise the wheel from the track and

slip the tire off, the work of a minute. See Conwell's testimony, page 28 of record.

Instead of throwing away a tire, as in the case of one fastened by rivets or screws when it has become loose before being worn out, the appellee's invention enables the engineer to slip the tire off the wheel, line it up with pieces of metal, and then re-shrink the tire again upon the wheel-centre. The appellee's device also enables the tire to be worn very much longer, and consequently very much thinner than a tire secured to the wheel by rivets or screws, or one held in place on the wheel by shrinkage only (for with heavy steel tires, to avoid the damaging effects of bolt holes, this plan of depending on shrinkage alone to hold the tire came to be much used); this result was a very important desideratum in an economical point of view, for with tires of 2½ inch thickness, weighing over 1,000 pounds each, of costly cast-steel, any device which would enable the user to get even a small fraction of an inch greater wear out of his tire made a difference on each engine of many hundreds of dollars. Another advantage derived from the appellee's improvement is the absence of any necessity for undue expansion and contraction in shrinking on the tire, or, in other words, that *less* shrinkage is necessary, for the flange *assists* the shrinkage to bear the lateral thrusts. The danger arising from a "too tight" tire, and its liability to snap, has already been referred to in the quotations from the "Proceedings of the Society of Engineers," a publi-

cation offered in evidence by the appellants; and this question of shrinkage, and the danger of overdoing it, is therefore a very important one. It must therefore be apparent that a device in which this force is not alone depended on, but is assisted in its work, is of great utility on that account alone.

S. H. Dotterer, Master Mechanic of the Delaware and Hudson Canal Company, testified, page 61 of record, "the shoulder of the Mellon wheel or tire assists to bear the jar or shock while running on a curve; for that reason, I think it will have a tendency to keep tight on the wheel longer."

Austin Moore, Engineer for the Lackawanna and Susquehanna Coal and Iron Company, testified, page 63 of record: "In applying the Mellon tire, I would not use more than seventy-five per cent. of the expansion or shrinkage which I would use in applying the tires by shrinkage alone." * * * And again, on page 64, "the reason why the Mellon tire need not hug the wheel so closely as a tire fastened by shrinkage only, is that it has the shoulder; if the tire has either the shoulder or screws, it helps the force of the shrinkage to bear the lateral thrust, which loosens the tire from its seat on the wheel; the result of that is, that the Mellon tire does not come loose from the wheel, so soon as a tire fastened by shrinkage alone, or by any other method; when a tire comes loose on the wheel, it needs to be taken off, re-expanded, and lined up by inserting thin pieces of iron between the wheel-centre and the tire, to tighten it."

But the defendants themselves have furnished the best evidence of the great durability of the appellees' device, for all four of their employees—Goodwin, the superintendent, page 82, and Hofecker, Kinsey, and Mitchell, master-mechanics, pages 73, 77, and 75—testified that of the whole 503 Mellon tires, put on by the appellants between 1866 and the date of the decree, in 1874, *not a single one* had either been *worn out* or *taken off* up to that time (1876).

So far, on the question of utility, the advantages of the appellees' improvement, in an economical point of view only, have been considered; but its chief and greatest merit is the safety in its use secured to engineers and the public. It may not be out of place here to quote the testimony of Mr. Dotterer, of the Delaware and Hudson Canal Company, on this point; he testified, page 60 of record: "with a Mellon tire it is impossible for it to slip off the wheel-centre, unless it is absolutely broken in pieces." It is scarcely necessary to explain this element of safety more than has already been done, for it is obvious on inspection of the device, coupled with the explanation of its mode of operation.

APPELLEE'S SPECIFICATION.

In view of the state of the art, and of the nature of the prior devices, as above set forth, the specification, claim, and drawings, are free from ambiguity and completely intelligible. The invention is described as "a new and useful improvement in applying tires

to locomotive wheels." The invention is thus related not to wheels for tenders, wagons, etc., but to wheels for locomotives, and to the exigencies, requirements, and service of that special and more important class of wheels.

The patentee then refers to his drawings, which are three in number. He states that Figures 1 and 2 are central sections of a locomotive wheel having a tire applied to it according to his invention. In those drawings the rail of the railroad track is to be regarded as placed at the right hand of the projecting flange *b*, at the lower extremity of those figures, so that the right hand side of the wheel-sections in the drawings, will represent the outside of the wheel, relatively to the rails, and the left hand side of the sections represents the inside of the wheel, relatively to the rails. In other words, the flanges of the tires, when a set of wheels united by their axles, is in position, on a railroad, in actual use, project downwards inside of, and between the rails of the track. In the drawings, Figure 1 represents the additional flange projecting at *a*, from the wheel-centre. Figure 2 represents two sections of wheels, showing the two alternative forms in juxtaposition, and in which at *a*, in the upper portion of the figure, the additional flange projects from the tire, and at *a* in the lower portion of the figure, the additional flange projects from the wheel-centre.

It was known at the date of the invention that tires, according to the material of which they were

made, or to the nature or duration of the use to which they were subject, would wear thinner, and would, to a greater or less degree, stretch or spring, and become loose on the wheel-centre, the result of which was that the tire would curve upward and outward, the greatest curvature being at or near the centre of the tire in the direction from one side of it to the other. This state would, of course, affect the position of the edges or corners of the wheel-centres and of the tires, relatively to each other. A modification of, or a displacement from, their original adjustment to each other would thus take place, which would have a more or less injurious effect, so that however seemingly perfect the normal or original correspondency or fitting of the parts to each other might be, it would result from actual use that new forces would be brought into play, which would disturb that correspondency and impair the usefulness of the additional flange. This was anticipated by the patentee, and in making a full disclosure of his invention, as the law required him to do, he sets forth, in his specification, a mode of obviating the difficulty. To this end figure 3 is introduced, which he describes as "a section of a portion of a locomotive wheel, having its tire affected by wear, drawn with a view of showing the advantage of one feature of my invention." It will be observed in the figure that the tire has risen in the centre (as illustrated by Exhibit Lisk, p. 19 of record), where it has been worn thinner, and that the large flange of the tire has been pressed laterally from its

normal position, which, of course, disturbs the positions of the corners and surfaces of the tire and wheel-centre relatively to each other. It will be noticed also that the patentee speaks of this figure as showing "the advantage of *one feature* of my invention"—that is to say, the feature which shows how he proposes to adapt his invention to the results of the continued wear and use of the tire.

After this general reference to the drawings, he next sets forth the object of his invention, which is declared to be "the securing of tires on the wheels of locomotives without the aid of bolts, and in such manner that the tire in case of becoming loose, cannot casually slip off from the wheel," all the various forms of bolts which are found so abundantly in the prior history of the art, are dispensed with by the patentee, and the two-fold object of his invention is stated to be, to secure the tire on the wheel without the aid of bolts, and also to do this in such a manner that the tire, in case of becoming loose, cannot casually slip off from the wheel. He further proceeds to say that "the invention consists in having the wheel, or the tire which is to be fitted on the same, provided with a single flange, arranged in such a manner that said flange, in connection with the usual flange on the tire, will keep the latter on the wheel." In other words, a wheel-centre, or the tire, as the case may be, is to be provided with a single flange—thus getting rid of the forms of double flange found in the prior devices—and then the wheel, with its tire, is to be placed in such relation and co-

operation "with the usual flange on the tire" as, "in connection" therewith, to keep the tire on the wheel. This, primarily, accomplishes the object in view, namely, retention of the tire, by the concurrent or united action of the single with the usual flange. The patentee then adverts to the manner in which he proposes to anticipate and obviate the effect of wear and tear, as above spoken of, by giving a particular configuration to the single flange. His language: "The invention *also* consists in constructing the tire with a rounded edge at one side of its inner surface, in order to prevent said edge from indenting and sinking into the periphery of the wheel, a contingency which would otherwise occur in consequence of the tire becoming stretched by use." This rounding of the edges, here spoken of, was to diminish the friction, indentation, cutting and sinking, which would take place in consequence of the future stretching of the tire by use. The "rounded edge" was a more complete and useful form of edge, because it anticipated "a contingency which would otherwise occur." It appears from the defendant's answer, and from the examination of his witness, and it was so argued in the Court below, that, in the view of the patent taken by the defendant, the invention consisted simply in rounding the edge of the tire, and in giving a corresponding form to the wheel centre. In other words, that if the edge were rectangular, or were of any other form than rounded or curved, there was no invention by the patentee and no infringement by the defend-

ant. It is evident, however, that this very narrow and merely verbal view disregards the patentee's object, which he has declared to be "the securing of tires on the wheels of locomotives without the aid of bolts," and to do this by means of "a single flange," which is to be arranged in such a manner as to act in connection with the usual flange on the tire," and thereby "keep the latter on the wheel." That view also disregards the express language of the specification which declares that the rounding of the edge is a suggestion superadded for the purpose of obviating a future contingency occasioned by the continued use of the tire. The true nature of the relation of the rounded edge to the invention and to its object, is thus apparent. It is a modified form of edge adopted to meet a probable future difficulty or contingency arising in the use of the invention, and intended, by anticipating the difficulty, thus to obviate its objectionable results.

As the general manner of shrinking tires on the periphery of wheels was quite well known, the patentee simply refers to it, and then points out how, after the tire is thus applied, the single flange and the ordinary flange will co-operate to retain the tire without the use of other appliances. "It will be seen that the flange *a* prevents the tire, should it become loose on the wheel A, from slipping off at the inner side of the wheel, and the flange *b* of the tire will, of course, prevent the latter from slipping off at the outer side

operation "with the usual flange on the tire" as, "in connection" therewith, to keep the tire on the wheel. This, primarily, accomplishes the object in view, namely, retention of the tire, by the concurrent or united action of the single with the usual flange. The patentee then adverts to the manner in which he proposes to anticipate and obviate the effect of wear and tear, as above spoken of, by giving a particular configuration to the single flange. His language: "The invention *also* consists in constructing the tire with a rounded edge at one side of its inner surface, in order to prevent said edge from indenting and sinking into the periphery of the wheel, a contingency which would otherwise occur in consequence of the tire becoming stretched by use." This rounding of the edges, here spoken of, was to diminish the friction, indentation, cutting and sinking, which would take place in consequence of the future stretching of the tire by use. The "rounded edge" was a more complete and useful form of edge, because it anticipated "a contingency which would otherwise occur." It appears from the defendant's answer, and from the examination of his witness, and it was so argued in the Court below, that, in the view of the patent taken by the defendant, the invention consisted simply in rounding the edge of the tire, and in giving a corresponding form to the wheel centre. In other words, that if the edge were rectangular, or were of any other form than rounded or curved, there was no invention by the patentee and no infringement by the defend-

ant. It is evident, however, that this very narrow and merely verbal view disregards the patentee's object, which he has declared to be "the securing of tires on the wheels of locomotives without the aid of bolts," and to do this by means of "a single flange," which is to be arranged in such a manner as to act in connection with the usual flange on the tire," and thereby "keep the latter on the wheel." That view also disregards the express language of the specification which declares that the rounding of the edge is a suggestion superadded for the purpose of obviating a future contingency occasioned by the continued use of the tire. The true nature of the relation of the rounded edge to the invention and to its object, is thus apparent. It is a modified form of edge adopted to meet a probable future difficulty or contingency arising in the use of the invention, and intended, by anticipating the difficulty, thus to obviate its objectionable results.

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of the wheel. By this arrangement no bolts or set-screws are required to aid in fastening the tire on the wheel, for it is impossible for the tire to leave the wheel, either at the right or left side thereof." Thus the single flange, in connection with the usual flange on the tire, by their own co-action and relation, and without the aid of other devices, retains the tire on the wheel.

The patentee then makes the obvious statement that the same result may be attained by adopting the alternative form of arrangement, that is to say, by placing the single flange on the tire, instead of the wheel-centre, with, of course, a modification of the surface of the wheel-centre corresponding thereto.

After thus illustrating the object of his invention, he explains more fully the advantage to be additionally derived from the rounding of the edge, and says: "With my improvement the flange *a* would cause the inner edge of the inner surface of the tire to indent the periphery of the wheel, or form a crease in it if the edge *c* were not rounded." But, in order to show in explicit language, that this rounding of the edge does not constitute the sum or the substance of his invention, although it bears a useful relation to its practical application, he adds, in terms, "the great feature in this invention is that I retain the tire on the wheel without the employment of bolts, rivets, keys, or other like attachments."

He then proceeds to point out that although by the cooling and shrinking of the tire, when applied to the

periphery of the wheel, it will hold or bind the wheel firmly, yet that after continued use it will stretch, and thus become loose on the wheel. Under such circumstances, however, his method of tire-retention will enable the engine to be run for a certain extent, and that the tire, by reason of not having to undo any rivets or other fastenings, can then be readily slipped off. This is given by the patentee as a practical illustration, in which, as he says, "the convenience and utility of my improvement are apparent."

The patentee concludes his specification by the customary short statement of claim. He disclaims the invention patented to N. Hodge, November 18, 1851, which consisted of a compound wheel, constructed in part of india rubber, and representing a double flange. He disclaims these flanges by saying, "I do not claim the invention therein described, viz.: the angular flange upon the inner edge of the wheel, *and* the flange upon the outer edge of the wheel." He then states affirmatively, "I do claim as my invention the wheel with the curved flange upon the inner edge, in combination with a tire with a rounded corner, to fit said curved flange, as set forth." The wheel had been set forth in the specification as a locomotive wheel, the tire being attached by shrinkage, with a single flange, either on the tire or on the wheel-centre, and without bolts, rivets, screws, or other like attachments, whereby the tire was kept. The special purpose of the rounded edge (or curved flange) had also been fully described, and that feature is inserted in the claim as

representing the configuration of the edge or flange adapted to the contingency intended to be guarded against. The brief claim becomes completely intelligible by reading it in connection with what is antecedently "set forth." It is a claim to the wheel, not only as embodying "the great feature" in the invention, which adapts it to present use, but also as constructed with that form or modification of the corner or flange, which may be adapted to secure the most useful results from continued use. It is accordingly respectfully submitted that the entire specification and claim are free from ambiguity; and that taken together, they fully, adequately, and in due conformity with law, disclose the nature and subject matter of the invention.

THE PROOFS OF INFRINGEMENT.

If any proof was required beyond or in addition to the admissions in the answer (see page 5 of record), it was supplied by the testimony of John Swift and Austin Moore, pages 10 and 11 of record. These witnesses identified the models, Exhibits B and C, as having been made in accordance with the drawings and specifications of appellees' patent; and that prior to the filing of the Bill, each had seen tires and wheels so constructed and applied; in one case like Exhibit B, and in another case like Exhibit C, upon engines of the corporation appellant, bearing the name of the latter, and in their engine-house and repair shops, both at South Easton, in the State of Pennsylvania.

Indeed, the mode of construction and operation of the wheels and tires made and used by the appellants was not a disputed question in the cause. The models, produced by the appellants themselves, of the wheels and tires used by them, were precisely similar to the complainants' model, Exhibit C.

THE MASTER'S REPORT.

By the terms of the decree entered October 7, 1874, the appellants, defendants below, are adjudged to have infringed the appellees' patent, dated October 2, 1866, and the Master was directed to ascertain and assess the profits and gain made and received by the defendants in consequence of such infringement.

The infringement consisted not only in the use by the appellants of the patented invention, but in the manufacture thereof.

From the nature of the invention it is not an easy matter to accurately estimate, in dollars and cents, the whole advantage, saving, or gain, derived to the defendants from the use of the appellees' invention; such advantage, saving, or gain, consisting of the elements of ease and economy, and saving of time in its manufacture, application, and repair; additional durability from its form, great safety in use, and other items of advantage over other forms of locomotive tires and wheels, and methods of attaching or securing the same, as testified by Mr. Conwell before the Examiner, pages 26 to 29 of record.

Under these circumstances, the appellees sought to have the Master adopt the license price as the measure of the appellant's profits or gains, and took proofs in support of the offer stated on pages 39 and 40 of record; but the Court, after hearing exceptions to the Master's First Report, (see pages 49 to 53 of record), referred the matter back to the Master, with instructions to take proofs of the gains and profits to the appellants from the manufacture and use of the improvement patented, and accordingly the Master took such proofs and reported thereon. His Second Report is found on pages 86 to 91 of the record.

The appellees endeavored, by the only means within their reach—the examination of skilled artisans in the art to which the invention belongs—to approximately estimate the actual value of the advantage to the appellants of the patented device.

Under the order of the Master, the appellants produced an account of the tires and wheels similar to the appellees' invention, made and used by them on their railroad, from which it appears that they had applied and used altogether 503 of such tires. Of these, 354 were manufactured by the appellants, and the remaining 149 by the builder of some of the appellants' engines (Mason & Co.) Of these 354 tires, 142 were over 2¾ inches thick, and the remaining 212 less than 2¾ inches thick; 146 of these 354 tires were made before the date of the assignment to Matthews, November 17, 1869, and the remaining 208 after.

The other 149 tires, made by Mason & Co., engine

builders, and purchased and used by the appellants, were, with the exception of 12 tires made in June and July, 1869, made between April, 1870, and November, 1874; 42 of these tires were less, and the remainder over 2¾ inches thick.

Whatever advantage or saving accrued to the appellants, either in the first cost, repair, or additional durability of the patented device over other devices for the same purpose, the appellees would be entitled to, under the ruling in Mowry *vs.* Whitney, 14 Wallace, and other cases since decided.

From the testimony it appears that the appellants adopted and used the patented device from the time of its first introduction to the time of the granting of the injunction in this cause; and continued thereafter to use those applied before the entering of the decree. It also appears that early in 1867, negotiations were pending between Mr. Mellon and the appellants for the use by the latter of the patented invention upon their railroad, which negotiations continued down to the time of filing the Bill in this case, in the spring of 1868; that the appellants, early in 1867, had full notice of the appellee's claim, and of his prices of royalty charged; that the appellants refusal to pay the royalty was not based upon a want of *utility or value* in the invention, but solely upon an allegation of want of *novelty*. See testimony of Edward Mellon, page 45. This was not denied in any manner by the appellants, and is a significant fact in the present

inquiry. Another important fact is, that at the time these negotiations were opened, in April, 1867, the appellants had but 58 of these tires in use, and at the time of the filing of the Bill they had but 94 of them in use; all the others of the 503 were applied since suit brought. This brings us to inquire whether or not the act of the appellants in thus continuing the infringement to so large an extent after suit brought, is not alone an implied admission by the appellants of the great value and utility of the patented device.

It has been said in some of the reported cases that the fact of the defendants adopting the patented device to the exclusion of other mechanism for the same purpose amounts to an implied admission of utility and value in the patented invention. Is it not stronger in the present case, where the appellants having had notice of the appellees' claim in April, 1867, continued to use the invention, and increased the *manufacture* of such tires from 58, in 1867, to 94 in April, 1868, when the Bill was filed, and since then increased the same to 503, willing, for the sake of using the invention, to incur the expense and take the risk of a long litigation? It certainly raises a strong presumption that the invention was of great value and utility to the *appellants*, since they continued the *manufacture* down to the very time when they were stopped by the decree for an injunction and account.

The theory of the appellees' case before the Master was that not only can the patented improvement be constructed at a less first cost than the next best device

for the same purpose, but, as compared with a device equally cheap in first cost, it has one-fifth more durability, so that the saving in metal in the latter case is equal to or greater than the saving in first cost over the first-mentioned device.

The advantages of safety in use and economy in repair derived from the use of the patented invention being incapable of estimation in money value, the appellees were obliged to abandon them in this inquiry, and to rely upon the other points of superiority mentioned.

To establish the appellees' case they called several witnesses, who testified:

Three known methods of attaching steel tires:

1st. By Mellon's improvement.

2d. By means of screws or nipple bolts.

3d. By shrinkage only.

That prior to about 1867 or 1868 wrought-iron tires were used, fastened to the wheels by bolts or rivets; since then steel tires have been, and are now, universally used.

It was testified on behalf of the appellees that the method of attachment by set screws and bolts was the next best device to the patented method.

See testimony of Edward Mellon, page 66. Dotterer, page 60. Conwell, page 56. Austin Moore, pages 62 and 63.

It appeared from the testimony on both sides that shrinkage was common to all these modes of fastening steel tires.

The saving in the first cost of the patented improvement, as compared with tires secured by screws or nipple bolts, is the cost of turning the holes or screw threads in the wheel centre and tire, and the screws or bolts; this saving was stated by the witnesses as as follows:

Dawson,	$13.00	per	wheel;	page	54
Conwell,	14.46	"	"	"	56
Swift,	13.30	"	"	"	58
Moore,	16.00	"	"	"	62
Mellon,	14.00	"	"	"	65

Moore, page 62, says:

"*My estimate of* $16, which I have stated as the cost of attaching a steel tire by set screws, is the *saving derived from the use of Mellon's improvement*—that is in the cost of *applying* the tires to the wheels.

The lowest figure above stated is $13 per wheel, and the average would be $14.15 per wheel, but at the lowest figure named ($13 per wheel), the saving upon the 503 tires and wheels used by the defendants, would amount to $6,539, if the saving in first cost alone is to be the only item of advantage or saving to be charged against the appellants, in ascertaining the amount to be paid by them under the decree, comparing appellees' tires with those secured by screws or bolts.

Mellon says, page 66: "I think that fastening tires by set screws is the next best method to mine."

Conwell (Master Mechanic Delaware, Lackawanna, and Western Railroad—they use a great many Mellon tires) says, page 60: "I think the method known as the Mellon improvement, would be the safest and *most economical* * * * * "I suppose that they look upon the *set screws* as the *next best method* of attaching the tires; I should judge that is the judgment of mechanics generally, because set screws are generally used."

John Swift (Superintendent of Dickson Manufacturing Co.) says, page 58: "Some builders still use *screws* with the steel tire; I presume that most of them do; I observed on one engine to-day—*a new engine*—that the tires were fastened by set screws; it was marked as if made by the Rogers Works."

Samuel Dotterer (Master Mechanic Delaware and Hudson Co.—has charge of their engines) says, page 60: "The usual method of fastening a steel tire is by set screws."

Austin Moore (Mechanical Engineer, formerly with Delaware, Lackawanna, and Western Railroad Co., now with Lehigh and Schuylkill Coal and Iron Co., Superintendent mines and engines) says, page 62: "I also know that tires are *sometimes* put on the wheels by shrinkage only," and on same page, "as between the two methods of attaching tires by set screws or by shrinkage alone, I think the *former* mode is *preferable*, although the first cost is greater (see his reasons for

this on pages 62 and 63): "the set screws are serviceable, because they would hold the tires in position after they become loose; the set screws, also, to a limited degree, assist in bearing the lateral strains of which I have spoken; I presume that is a part of the design of people applying them; *that would be the effect at any rate.*" See also, the testimony of this witness on page 64.

To meet this case, the appellants did not offer to show that the estimates of cost of applying tires with screws or bolts was incorrect, but offered and attempted to show,

1st. That set screws are not now used, but plain shrinkage only.

2d That Mellon's invention has no value, and that plain tires attached by shrinkage only, are equally as safe and efficient as the Mellon tire, or as those secured by screws.

They called ten witnesses, only three of whom, Roop, Graham, and Hodgman, can be said to be entirely disinterested; of the others, two, Parry and Williams, builders of engines for the defendants, are, of course, interested with the railroad companies in resisting patented inventions; one, Dawson, is in employ of a company infringing and sued; the other four, Hofecker, Kinsey, Mitchell, and Goodwin, are in appellants' employ.

Can it be said that their testimony overcame the force of appellees' proofs that the fastening by set

screws or nipple bolts was the next best method to the patented improvement? Their first witness, Roop, Master Mechanic, North Pennsylvania Railroad, said, on page 66: "The general mode of attachment is by shrinkage alone." But on cross-examination he said (page 67): "when I made this statement, I did not refer to any road in particular; *I am not familiar with other roads.* I made the statements from *reports* of Master Mechanics at their convention, *recommending* that by shrinkage alone." "I don't know how the tires are fastened on the Reading road, nor on the Delaware, Lackawanna, and Western, nor on the Delaware and Hudson, nor the Jersey Central, nor the Pennsylvania and New York road, nor the Morris and Essex. We have *fifty engines on our road*; TWO-THIRDS have their tires *fastened* by SET SCREWS, the others by shrinkage."

So that it appears from the cross-examination of this witness, that the only knowledge he had on the subject would properly have led him to say precisely the opposite of what he did say, for two-thirds of all the engines he had any knowledge of, had tires fastened by set screws.

The next witness, *Charles Graham*, says, p. 67: Am Master Mechanic, Lackawanna and Bloomsburg branch of the Delaware, Lackawanna and Western Railroad. I think that shrinkage is all that is sufficient; I think it is the best method; it is universally adopted now." But on cross-examination, p. 68, he says: "When I swore we used shrinkage only, I re-

ferred to the Lackawanna and Bloomsburg branch only;" and "when I swore the universal method of attachment was by shrinkage only, *I referred to my own experience on my own road*, and to *conversations* with other master mechanics; we have 26 engines altogether." "One is fastened by set screws."

It is well known in the case that the Delaware, Lackawanna, and Western use the appellees' improvement largely.

The next witness, *Stilmann A. Graham*, says, p. 69, master mechanic Philadelphia, Wilmington, and Baltimore Railroad Co.: "Shrinkage alone is the general mode in use on our road."

P. 70, cross-examined: "We have 75 engines—8 or 9, perhaps 10, are put on taper and fastened by set screws. As to five engines, I don't know how they are put on."

Charles T. Parry, of the Baldwin Works, testified, p. 71—"In most of the wheels, tires are put on by shrinkage only."

On cross-examination, he says, p. 72, "prior to 1865 we used wrought-iron tires principally; riveted most of them."

"We built a great many engines for Lehigh Valley Railroad up to present time. I think that during the past two or three years we have generally used the nipple-bolt to fasten the tires on the wheel-centre. I think we built some engines for Lehigh Valley Road with steel tires, fastened by set screws. My belief is, that all the rest of the engines which we built for that

company had steel tires, fastened by nipple-bolts. (Cost of nipple-bolt is about same as set screws—see Dawson, p. 78.) P. 72. We built a class of engines, like the "Consolidation," for Lehigh Valley Company, with tires fastened by set screws."

"We fasten tires more now with nipple-bolts than set screws. (See this testimony, p. 72.) I think the best method is to shrink them on and fasten them when required with nipple-bolts. In my opinion they are of no great use. We apply them to meet the different opinions of men. Some think they are useful, some think they are not. My impression is, we are putting nipple-bolts to most. We attach them in that way only when so ordered, and to meet instructions or known wishes of purchasers. We have, until very recently, built engines for nearly all the principal railroads in Pennsylvania and New Jersey."

Edward H. Williams, of the same works, was called by appellants and said, p. 79: "Am *theoretically* familiar with construction and use of locomotives; (p. 79) I consider shrinkage alone the best method of attaching the tires; that is the ordinary way at our works."

His statements are directly the contrary in this respect to Mr. Parry's, of the same works. At all events, where shrinkage alone is used, it is done of *their own motion*. See p. 79: "We follow the mode of attachment prescribed by our patrons. *In the absence of instructions* we use *shrinkage only*."

And on p. 80, he says: "Engine No. 108, built in 1865 by our works for Pennsylvania Railroad, tires fastened by nipple-bolts." "Engines of Reading Railroad, so far as I know, (have seen a few) have their tires fastened by some sort of bolts."

This witness produced a statement from his books; as to whether *it* is correct, or *Mr. Parry* is correct, (for they contradict each other) is best determined by a reference to Exhibit D of appellants' engines, in which we find a *large number* of engines built by *Baldwin Works* for defendants down to 1874, and as the appellants did not use shrinkage alone till November, 1874, and as these engines did not have tires with appellee's improvement, they must necessarily have been fastened with either nipple-bolts or screws.

Walter Dawson, Superintendent of Delaware, Lackawanna and Western Railroad, says, page 77: "We own in all 318 engines, about 30 have tires attached by shrinkage only; the rest have Mellon's device on the tires."

The other witnesses for the defendant, Hofecker, Kinsey, Mitchell, and Goodwin, all in appellants' employ, of course thought shrinkage alone sufficient, but as they were not of that opinion until the decree for injunction, in this case, in November, 1874, their testimony in that particular is not entitled to much respect, as previous to that time, from 1866 up, they had generally used either the appellees' method, or screws and bolts.

Notwithstanding all this testimony for the appellant,

the appellees' proofs that the fastening by screws or bolts is the *next best* method to the patented method, stands unimpaired. For at most the appellants' proofs only show that in the *opinion* of *those witnesses* the shrinkage alone is sufficient, while the record is full of instances of preferences for screws or bolts by many railroads and users of engines, viz.: the North Pennsylvania, the Reading Railroad, and others. And a number of such tires were so made by Baldwin Works for the defendants themselves. (See Parry, page 72.)

Rogers' Works (Locomotive builders,) also use screws. See Swift, page 58.

Now, from the evidence, we find the object of using bolts or screws is,—

I. To assist the shrinkage in holding the tire in its place on the wheel, thus securing first, safety to a certain extent; second, preventing it from becoming loose as soon as it otherwise might, the screws assisting to bear the shock of the wheel on the tire (see Dawson, page 78); and lastly, and most particularly, to keep the tire tight on the wheel when the tire has worn down thin.

Dawson, defendants' testimony, page 78, says: "I don't think that screws or bolts will assist materially in keeping tires on the wheels, EXCEPT *when the tires become thin.*" And this testimony on the part of appellants' witness proves the appellees' proposition, for it is admitted by appellee that when a *new* THICK

TIRE is put on, the *shrinkage* alone will *ordinarily* hold it. It is when half worn out and gets thin, that the screws or bolts, or the Mellon flange, keep it tight on the wheel, and enables it to be *fully* worn out, and also provides the additional elements of safety, and also economy of repairs, for when a tire becomes *loose* it must be taken off, turned down, lined up, and then shrunk on again. And when a *plain shrinkage* tire *half worn* out *comes loose* it is *too thin* after being turned down to put it on again. (See Kinsey's testimony, page 76.) He produced a piece of a plain tire (1⅜ inches thick at thinnest part) and says: "We were rebuilding the engine, and *the tire would have been* TOO THIN *by the time we would have got it turned down.*"

The appellee, Mellon, sought by his device to accomplish in a safer, cheaper, and a more effectual manner, the result attained by the use of screws or bolts. Dawson says, page 78, "A continuous flange like Mr. Mellon's, will offer more surface * * (than the screws) * * to help sustain the shock of the wheel on the tire."

But in a *plain tire attached* by *shrinkage only*, there is no surface at all, either flange or screws, to assist the shrinkage to bear these shocks; necessarily a plain shrinkage tire must come loose sooner as it wears down thinner, than a Mellon or a screw tire, for Dawson says, page 78, "It is the stretching of the tire by its pounding on the rail, which tends to loosen it," and same page, "the bolts or screws would help to

keep it in place on the wheel;" and on page 79 he says,

"Q. If a tire be provided with any device that will keep it longer on the wheel without becoming loose or moving from its place, cannot such a tire be worn longer and thinner than a plain tire shrunk on and without any fastening?

"A. Yes."

And this is a witness called by the appellants.

And now, as to the mere private opinion of appellants' witnesses that a plain shrinkage tire can be worn as thin as Mellon's, it amounts to nothing, if their testimony be analyzed, for of the ten witnesses, Roop, Hodgman, Parry, and Williams, never *used* it. Graham admits, page 69, "put 7 Mellon tires on the truck wheels; * * * * the forward truck wheel is the most dangerous if broken; did it to try the experiment, rather than put them on by plain shrinkage. * * * * It is left to my judgment to decide what form of tires shall be used on our road. * * * * We have never received any benefit from them *because the tires have not worn* THIN ENOUGH *to tell.*"

Dawson admits, page 79: "I don't say our company has never derived any benefit from Mellon's improvement; I don't know whether it has or not."

And the remaining witnesses for appellants, Goodwin, Hofecker, Kinsey, and Mitchell, although they all say Mellon's tire has no value, and cannot be worn thinner than plain tire, are they competent to testify to that, when they all admit that not a single Mellon

tire that has been put on by appellants since they began their use of the patented improvement, has ever been worn out or taken off?

Hofecker says, page 73: Q. Will a tire with Mellon's device wear longer than a tire attached by shrinkage alone?

A. *We have not had a test of that*, but I don't see why it should.

Mitchell says, page 75: "I can't see, in my experience, anything to make me say it will wear any longer." And on same page: "*None of the engines on our road, fitted with the* MELLON *tire, have had the tire worn out and taken off.*"

Kinsey says, page 76: "I see no reason why it (Mellon's tire) would (wear longer). *As a matter of fact I do not know whether it does or not.* And on page 77: "We have WORN OUT and TAKEN OFF NONE of the *Mellon tires* SINCE WE PUT THEM ON."

Goodwin says, page 82: "I think that we have not taken *off any of the Mellon* tires SINCE THEY WERE ATTACHED."

Can it be said that this testimony is of more weight than the sworn statements of engineers called by the appellees, who had used the patented improvement for years, and were thoroughly familiar with its merits, and testified from their experience in the use of it.

Of the ten witnesses for appellants, five had never used appellees' improvement, and five could not say, from any knowledge or experience in the use of it, how thin it could be worn; their testimony, instead of con-

tradicting the appellee, is negative only; but the *controlling* fact in the cause is, that the *appellants have never worn out or taken off a Mellon tire since they first put them on.* This corroborates the appellees' allegation beyond a doubt, and would turn the scale against the *mere opinion* of fifty witnesses to the contrary. *Facta sunt potentiora verbis.* The payment of royalties by the Dickson Locomotive Works and the Delaware and Hudson Railroad Company, and others, strengthens the appellees' case. To sum up what was said by appellee and his witnesses on the subject, Conwell says, pages 26 to 29, before Examiner: "Mellon's can be worn one third longer in point of time; tires in use on wheels rise in the centre; less with steel than with iron; this tends to loosen the tire. In stretching, the flange tightens against the wheel centre and holds it in place." And on page 56, Master's minutes, he says, "The average thickness at which we take off tires is 1¼ inches; we have taken off tires 1⅛ inches thick. Can use tires fastened by Mellon's improvement longer and wear it thinner (page 57). The *life* of a tire is affected materially by the weight of the engine and size of the wheel."

John Swift says, page 58: I think the Mellon tire is generally worn thinner than the plain," and page 59, cross-examination, "I have examined tires which I knew were fastened by Mellon's improvement, running on the road, thinner than I would have used them if put on by shrinkage only. * * * * I have observed a great many instances of that description.

For freight service I would run a tire applied by shrinkage only, to about 1⅜ inches."

Samuel Dotterer says, page 60: "I think it (Mellon's) is far preferable to any other mode of fastening the tires, in safety and economy;" page 61, "the shoulder of the Mellon wheel or tire assists to bear the jar or shock while running on a curve; for that reason I think it will have a tendency to keep tight on the wheel longer."

Austin Moore says, page 62: "Steel tires, fastened by set screws, are not considered safe after being worn to one inch and a quarter in thickness; the tire then becomes loose on the wheel * * Mellon's plan is altogether the safest * * * the tendency of a tire to become loose is produced in a great measure by lateral strains in passing curves and crossing frogs; the shoulder, in Mellon's tire, offers a resistance to these strains, and absolutely prevents the tire from coming off the wheel;" and page 62, "I think that a tire, secured by shrinkage, could not with safety be worn so thin as one secured by set screws. I have seen one set of Mellon's tires worn down to full seven-eighths of an inch; Mellon's tires can be worn much thinner with perfect safety than tires secured by any other method mentioned by me. Steel tires are usually 2½ to 3 inches in thickness;" and cross-examination, page 63: "The reason why tires applied by shrinkage alone cannot safely be run so thin as tires fastened by set screws, is that in case of the breakage of the tire, or the tire becoming loose, the set screws would afford

some protection against the lateral thrust of the engine * * the commonest cause of the loosening of tires, is the stretching of the tire by being laminated upon the rail, and the lateral thrust mentioned;" and page 64, "As an engineer I can say that tires secured on Mr. Mellon's plan can be worn safely thinner than when secured in any other method mentioned by me; if the tire has either the shoulder or screws, it *helps* the force of *the shrinkage to bear the lateral thrust* which *loosens the tire from* its seat on the wheel; the result of that is, that the Mellon tire does not come loose from the wheel so soon as a tire fastened by shrinkage alone, or by any other method."

[And the defendants' witnesses say, *Roop*, page 66: "We wear the tires on our road to *an inch and a quarter* in thickness."]

Edward Mellon, page 65, cites an instance of engine "Pocono," which wore *iron* tires of his construction, "*through to the rail in one segment*," and also says, "steel will not stretch so soon as iron under the lamination of the rail. A tire secured by shrinkage only, could not be used with safety less than 1¼ *inches*, it would become *loose then*, and have to be taken off and thrown away. A tire properly secured by my improvement, on a passenger engine, could be worn down to from seven-eighths to three-quarters of an inch, * * * * and on page 41, "I think the life of a tire would be one-fifth longer, at least, if my invention was used than without it; this estimate is based on a comparison with tires fastened by bolts,

and the comparison would be more favorable to my invention if made with tires not secured at all. The *life* of a tire depends upon the weight of the engine, and the force applied to move the wheel, as well as its own diameter." Page 42: "Tires secured by *bolts, rivets, or otherwise, would not be run after they had been worn to an inch and a quarter.* Mine can be worn to from seven-eighths to three-quarters of an inch." Page 42: "When a tire is put on by shrinkage alone, there is nothing to resist the blow of the rail but the tightness of the tire, and when the tire is worn to about 1½ *inches and under, the band becomes too thin* to resist the blow of the heavy engine, and the *blow of the rail moves the tire and loosens it, and a tire of that thickness is not worth the trouble of being repaired, because it is not strong enough to bear the shock; in mine the flange bears the shock, and it can be worn down thin.*"

[In this he is corroborated by Kinsey, appellants' witness, who produced a plain shrinkage tire, 1⅜ inches thick at thinnest point, and said it was too thin, after being turned down, to put on again. And also by appellants' four employees, Kinsey, Mitchell, Hofecker, and Goodwin, who say they have never worn out or taken off any of the Mellon tires since they were attached, and they have used 503 of said tires from as early as 1866 down to the present time.]

The whole case for the appellees on this point is summed up in a statement by Mr. Mellon, on page 42 Master's minutes, as follows: "If the tire is made one-

fifth more durable by my method, *its value would be increased by one-fifth of its cost.*

Walter Dawson says, p. 55: "Steel tire, 2½ inches thick, weighs 847½ lbs., worth 9 to 10 cts. a lb., price has varied in past seven years from 20 cts. to present price; never as low as now."

Swift says, pp. 58, 59: "2½ inch tire, weight 792 lbs.; 3 inch tire, weight 840 lbs., worth 10 cts. gold now; that is the price we paid for the last."

Mellon, p. 42, Master's Minutes: "2½ inch steel tire would weigh about 800 lbs."

Philip Hofecker, p. 74: "Our 2¾ inch steel tire weighs about 964 lbs."

Alexander Mitchell, p. 75: "All the steel tires I have put on are 3 inch tires, and weigh about 966 lbs., about 1000 lbs."

William Toothe, Agent for Krupp's steel tires, a witness called by defendant, before Examiner, said, p. 31 of record: "Price of steel tires from about 1864 to 1868, was 15 to 19 cts. gold per lb."

From these statements, a fair average weight of appellant's tires could be stated:—For 2½ inch tires, 850 lbs., and for 3 inch tires, 1000 lbs.—The *average* price from 1866 to 1876, could be given at not less than 15 cts., so that if as little as a quarter of an inch more of the metal was made effective by Mellon's device, a saving of $12 worth of metal on each of the tires would be effected. But the appellees fairly proved at least a saving of ⅛ of an inch of metal. Mellon's are worn to ½, and as low as ¾ of an inch, and the *others* to 1¼

inches, a saving of ½ to ⅝ of an inch, which saving of ⅝ of an inch at 15 cts. per lb., would amount to not less than $18 for each tire. The evidence would have justified a claim for ½ inch of metal saved, for it is clearly established that the Mellon tires can be safely worn to ¾ inch; but a fair average to do no injustice to either party, would be to estimate the savings on ⅝ of an inch of metal saved; this, even at *present* prices (10 cts. per lb., currency), would amount, on a 2½ inch, 850 lb., tire, and 2¾ inch, 960 lb., tire, to not less than $12 in each case, but the appellees were entitled to have the savings estimated at the average price of steel between 1866 and 1874, for the account includes tires made by appellants through all those years, from 1866 to 1874."

So that again summing up the evidence, we find that there is a *saving in first cost*, by the patented device, *over screw or bolt tires* of at least $14 per tire (averaging the figures given by the different witnesses). And as compared with plain shrinkage tires, not less than ⅝ of an inch, or $18 worth, more of the metal can be utilized by the patented improvement. But as the appellants had a right to use the cheaper method, they ought only be charged with the lower figure.

This saving of $14 per tire upon the 158 tires made by the appellants before the assignment by Edward Mellon to his co-plaintiff Matthews, amounts to, - - - - - - - - $2,212 00

And upon the remaining 345 tires made since (to November, 1874), amounts to - 4,830 00

A total of - - - - - - $7,042 00

If, on the other hand, it should be deemed proper to compare the appellee's improvement to tires attached by simple shrinkage only, the saving of ⅛ of an inch, or $18 worth of metal, by means of appellee's method, as compared with such tires, would have entitled the appellee to an award of $9,054 for the 503 tires used by the appellants; of which $2,844 would be due to Edward Mellon for tires made before the assignment, and $6,210 to the appellees jointly, for the infringing tires made and applied by the appellants to their engines, since the date of the assignment.

In view of the adoption by the Master, in his report, of the principles last above referred to, viz.: a computation of the appellants' gains and savings by use of the patented improvement as compared with plain tires attached to the wheels by simple shrinkage only, the appellees were willing to accept that mode of ascertaining appellants' profits or gains, payable by them under the decree, as the correct one, but excepted thereto in order that the Court should correct the plain error of the Master in construing and applying the testimony under that theory, in that the testimony fully warranted the conclusion that generally one-half to three-eighths of an inch more of the metal was utilized and made available by the appellees' improvement, and in no event, nor under any circumstances, was that saving of metal less than one-quarter of an inch; whereas the Master reported that only one-eighth of an inch more of the steel metal was utilized

and made available by means of appellees' patented mode of securing tires. This error was apparent by an examination of the proofs, for it is not alone on the testimony of Mr. Mellon, to which the Master takes exception, that the appellees relied, but on the testimony of his witnesses, which fully corroborate him. In the first place, it was testified to by all the witnesses who spoke on the subject, that *plain shrinkage* tires could not be worn thinner, nor would longer remain on the wheel, when worn down to 1¼ to 1½ inches in thickness, the latter in exceptional instances. Conwell, a witness in the employ of Delaware, Lackawanna and Western Road, says (record, page 26) Mellon tires can be worn one-third longer in point of time; and before the Master, page 56, the same witness says, "we take off *plain tires* at an average thickness of 1¼ *inches.*" Swift, page 59, says he would not run a *plain tire* for freight service less than 1½ *inches.* Roop, defendants' witness, page 66, wears the tires on his road to 1¼ *inches.* Mellon, pages 42, 65, and 66, gives the extreme limit of a plain tire at 1¼ inches; and Kinsey, the appellants' witness, page 76, took off a plain shrinkage tire as thick as 1⅜ inches, and said that it would be too thin, after being turned down, to have been used again. Surely this testimony warranted the conclusion that 1¼ inches was the extreme limit to which a plain shrinkage tire could be worn, as stated by Mr. Mellon. As respects the patented tires, the testimony of Mr. Mellon that his tire can be worn safely to as thin as three-quarters of

an inch, is not only uncontradicted, but is fully corroborated by the appellees' witnesses. (See testimony of Mellon, Swift, Dotterer, and Moore, before cited; and also see Dawson, defendants' testimony, pages 77, 78, and 79.) But giving the appellants the benefit of a very liberal construction of the whole testimony in their favor, by adopting the exceptional degree of minimum thickness, 1⅛ inches, as the lowest point that a plain shrinkage tire can be worn, as reported by the Master, and giving the appellants the benefit of an expression used by Mr. Mellon, pages 42, 65, and 66, and Austin Moore's observation, page 62, that Mellon tires are worn to seven-eighths to three-quarters of an inch, by accepting seven-eighths as the safe limit of wear of appellees' tire, there would still be a saving of a full quarter of an inch between seven-eighths of an inch for Mellon's, and 1⅛ inches for plain shrinkage tires, and this, upon a view of the testimony extremely liberal to the appellants, a construction which the conduct of the appellants, in their deliberate and persistent infringement, certainly did not call for or warrant. The Master, therefore, gave the appellants the benefit of every doubt in making his calculation of the savings or gains of the appellant; in that, instead of reporting, as he did under the principles adopted by him, a saving or gain of one-eighth of an inch, or $6 worth, of metal, he would have been fully justified in reporting that the proofs were overwhelming and conclusive that under all circumstances not less than one-quarter of an inch, or $12 worth, more of the metal of the tire is utilized and

made available by the appellees' patented improvement. So that, instead of awarding to the appellees a saving of $6 per wheel for one-eigth of an inch of metal saved in each of the 503 tires used by them, he would have been fully warranted by the proofs had he awarded to the appellees a saving of $12 per wheel for the quarter of an inch more of the tire utilized and made available to them on each of their 503 tires, or a gross sum of $6,036, as set forth in the appellee's third exception; and it is respectfully urged that in overruling said third exception of the appellees' and sustaining the Master's Report for the lesser sum, the Court dealt so very liberally with the appellants' that they have no cause whatever for complaint.

The argument of the learned counsel for the appellant that the profits, so estimated as above stated, were never earned by the appellant "because they have not used the wheels until the time arrived when that advantage could be realized, being under the injunction of the Court," (Brief page 18) and "because they were put under injunction, both interlocutory and final" (Brief page 16), is based upon a misconception of the proceedings in the Court below. In point of fact no injunction, either interlocutory or final, was ever issued by the Court below against the appellants, inasmuch as the appellants undertook not to make or put in use any *additional* tires, after the entry of the decree, and they were regarded by the appellees as amply responsible for the past and future use of the tires already applied by them.

HECTOR T. FENTON,
FURMAN SHEPPARD,
Counsel for Appellees.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 244.

EDWARD MELLON AND WILLIAM MATTHEWS, APPELLANTS,

vs.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FILED SEPTEMBER 15, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 244.

EDWARD MELLON AND WILLIAM MATTHEWS, APPELLANTS,

vs.

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1 UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

[SEAL.] In the circuit court of the United States for the western district of Pennsylvania, at Williamsport, it is contained inter alia as follows: No. 18, June term, 1875.

Docket entry.

EDWARD MELLON AND WILLIAM MATTHEWS
vs.
THE DELAWARE, LACKAWANNA AND WESTERN Railroad Company.

Bill in equity filed January 19, 1875. Same day subpœna in equity issued; returnable the first Monday of February, 1875. Præcipe filed January 19, 1875.

January 22, 1875, served the within subpœna in equity upon The Delaware, Lackawanna and Western Railroad Company, by making contents known and handing copy to W. F. Halstead, superin-
2 tendent of said company, at Scranton, Pa.

JOHN HALL,
U. S. Marshal.
Per J. W. SLOCUM, *Dep'ty.*

$10.30.

And now, March 1, 1875, Armstrong & Linn appears for defendant, reserving all exceptions, &c. Appearance filed. Plea of defendant filed April 5, 1875. Complainants' replication to defendant's plea filed April 22, 1875. Stipulation and depositions filed June 21, 1875. Deposition of Watts Cooke filed December 2, 1875.

And now, April 21, 1876, the above case was argued before Hon. Wm. McKennan, at Philadelphia, on a plea to bill. Mr. Odell, for defendants, opened. Mr. Fenton, for complainants, replied. Mr. Sheppard closed for complainants. Judge Linn closed for defendants. The court held the case under advisement.

Dec. 18, 1878, filed the following order:

Dec. 18, 1878, the def'ts plea is sustained, and the bill of complaint is dismissed without costs.

By the court.

3 Jan'y 30, 1879, allowance of an appeal to the Supreme Court of the United States, with approval of J. W. Moore and Richard Henwood as sureties, filed. Same day, affidavits of sureties filed.

Feb'y 8, 1879, bond of Edward Mellon and William Matthews, principals, and J. W. Moore and Richard Henwood, sureties, in the sum of $250.00. Dated Feb'y 6, 1879. Filed.

Præcipe for subpœna.

In the circuit court of the United States for the west. dist. of Pa., at Williamsport.

EDWARD MELLON AND WILLIAM MATTHEWS
vs.
THE DELAWARE, LACKAWANNA AND WESTERN Railroad Company.
No. 18. June T., 1875.
In equity.

Issue subpœna, returnable the first Monday of February, 1875.

FURMAN SHEPPARD,
H. T. FENTON,
Sol'rs for Complainant.

4 UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

[SEAL.] The President of the United States to The Delaware, Lackawanna and Western Railroad Company:

For certain causes offered before the circuit court of the United States in and for the western district of Pennsylvania, in the third circuit, in the bill of equity of Edward Mellon and William Matthews, we command and strictly enjoin you, The Delaware, Lackawanna & Western Railroad Company, that laying aside all other matters, and notwithstanding any excuse, you personally be and appear before the judge of the said court, at a session of the same court to be holden at Williamsport, Pa., on the first Monday of February, 1875, to answer concerning those things which shall then and there be objected against you, and to do further and receive what the said court shall have considered in this behalf. And this you are in nowise to omit, under the penalty of ten thousand dollars.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Williamsport, Pa., this nineteenth day of January, A. D. 1875, and the Independence of the United States the ninety-ninth.

HEPBURN McCLURE, *Clerk.*

The defendants are required to enter appearance in this suit on or before the return day of this writ; otherwise the bill may be taken pro confesso.

5 (Endorsed:) No. 18. June T., 1875. Edward Mellon and William Matthews vs. The Delaware, Lackawanna and Western Railroad Company. Subpœna in equity. Furman Sheppard, H. T. Fenton.

January 22, 1875, served the within subpœna in equity upon The Delaware, Lackawanna and Western Railroad Company, by making known contents and handing copy to Wm. F. Hallstead, superintendent of said company, at Scranton, Pa.

JOHN HALL,
U. S. Marshal,
P'r J. W. SLOCUM, *Deputy.*

6 *Appearance.*

In the circuit court of U. States, west. dist. of Penn'a.

EDWARD MELLON AND WILLIAM MATTHEWS
vs.
THE DELAWARE, LACKAWANNA AND WESTERN Railroad Company. } No. 18. June T., 1875.

And now, March 1, 1875, Armstrong & Linn appear for defendant, reserving all exceptions, &c.

ARMSTRONG & LINN, *P. D.*

(Endorsement:) No. 18. June T., 1875. Edward Mellon and William Matthews vs. The Delaware, Lackawanna and Western Railroad Company. Appearance for defendant. Filed March 1, 1875.

7 *Order of court.*

Cir. c't west. dist., Williamsport.

EDWARD MELLON AND WILLIAM MATTHEWS
vs.
THE DELAWARE, LACKAWANNA & WESTERN R. R. Co. } No. 18. June T., 1875.

Dec. 18, 1878, the def't's plea is sustained and the bill of complaint is dismissed without costs.

By the court.

(Endorsed:) No. 18. June T., 1875. Mellon vs. D. L. & W. R. R. Co. Order dismissing bill. Filed Dec. 18, 1878.

8 *Allowance of appeal, &c.*

In the circuit court of the United States in and for the western district of Pennsylvania, at Williamsport.

EDWARD MELLON ET AL.
vs.
THE DELAWARE, LACKAWANNA AND WESTERN R. R. Company. } In equity, of June T., 1875. No. 18.

And now, January 30, 1879, the complainants, by their counsel, come into court and pray for allowance of an appeal to the Supreme Court of the United States from the order or decree of the circuit court entered December 18, 1878, dismissing complainants' bill, &c.; which appeal is allowed, security in $250, and J. W. Moore and Richard Henwood, both of Scranton, Penn'a, are approved as sureties.

By the court.

W. McK.

9 Personally appeared before me, a notary public, duly commissioned and sworn, in and of the city of Scranton, State of Pennsylvania, Richard Henwood, a resident and tax-payer of said city, who, being duly sworn according to law, deposes and says that he is the owner of real estate worth twenty thousand dollars ($20,000) or more, above all encumbrances, at present valuations.

RICHARD HENWOOD.

Sworn and subscribed to before me 23d Jan'y, 1879.

[SEAL.] HAROLD LENET,
Notary Public.

10 Personally appeared before me, O. B. Partridge, a notary public in and of the city of Scranton, State of Pennsylvania, J. W. Moore, a resident and tax-payer of said city, who, being duly sworn according to law, deposes and says that he is the owner of real estate worth five thousand dollars or more, above all encumbrances, at present valuations.

J. W. MOORE.

Sworn & subscribed before me this 23d day of Jan'y, 1879.

[SEAL.] O. B. PARTRIDGE,
Notary Public.

11 (Endorsed:) U. S. C. C. In equity. Western dist. of Penn'a at Williamsport. Edward Mellon et al. vs. Delaware, Lackawanna & Western R. R. Co. June T., 1875. No. 18. Allowance of appeal to Supreme Court U. S., and approval of sureties. Filed Jan'y 30, 1879. Furman Sheppard, H. T. Fenton, for compl'ts.

12 *Bond.*

In the circuit court of the United States in and for the western district of Pennsylvania.

EDWARD MELLON AND WILLIAM MATTHEWS
vs.
THE DELAWARE, LACKAWANNA AND WESTERN R. R. Company.
} In equity of June T., 1875. No. 18.

Know all men by these presents that we, Edward Mellon, William Matthews, John W. Moore, and Richard Henwood, all of Scranton, in the State of Pennsylvania, are held and firmly bound unto The Delaware, Lackwannna and Western Railroad Company in the sum of two hundred and fifty dollars, to be paid to the said The Delaware, Lack'wanna and Western Railroad Company, its certain attorney, successors, and assigns, to which payment well and truly to be made we
13 bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, dated the 6th day of February, A. D. 1879.

Whereas lately, at a circuit court for the western district of Pennsylvania, in a suit depending therein between the said Edward Mellon and William Matthews, complainants, and the said The Delaware, Lack'wanna and Western Railroad Company, defendants, a final decree was entered on December 18, 1878, dismissing the said bill of complaint without costs, and the said Edward Mellon and William Matthews having obtained an appeal and allowance of the said court, filed thereof in the clerk's office of the said court, to reverse the said decree in the aforesaid suit, which appeal is taken of the term of the entry of the said final decree:

Now, the condition of this obligation is such that if the said
14 Edward Mellon and *and* William Matthews shall answer all costs if they fail to make their said plea good, then the above obligation to be void and of no effect, else to be and remain in full force and virtue.

Witness our hands and seals the date aforesaid.

EDWARD MELLON. [L. S.]
WM. MATTHEWS. [L. S.]
J. W. MOORE. [L. S.]
RICHARD HENWOOD. [L. S.]

Signed, sealed, and delivered in the presence of—
AUSTIN MOORE.
R. J. MATTHEWS.

(Endorsed:) U. S. circuit court, west. dist. of Penn'a. Edward Mellon et al. vs. The Del., L. & W. R. R. Co. Equity. June T., 1875. No. 18. Appeal bond. Filed Feb'y 8, 1879.

Circuit court of the United States in and for the western district of Penn'a. In equity.

EDWARD MELLON AND WILLIAM MATTHEWS
vs.
THE DELAWARE, LACKAWANNA AND WESTERN Railroad Company.

June term, 1875. No. 18.

PLEADINGS, PROOFS, AND EXHIBITS.

15 Circuit court of the United States in and for the western district of Pennsylvania. In equity.

EDWARD MELLON AND WILLIAM MATTHEWS
vs.
THE DELAWARE, LACKAWANNA AND WESTERN Railroad Company.

To the honorable the judges of the circuit court of the United States in and for the western district of Penn'a.:

Edward Mellon and William Matthews, both of Scranton, in the State of Pennsylvania, bring this bill against The Delaware, Lackawanna and Western Railroad Company.

And thereupon your orators complain and say that on or before the 2d day of October, 1866, one Edward Mellon was the true, original, and first inventor or discoverer of a certain new and useful improved mode of attaching tires to wheels of locomotives, not known or used by others before his invention or discovery thereof, and not, at the time of his application for letters patent of the United States therefor, in public use or on sale with his consent or allowance.

And your orators further show unto your honors that the said Edward Mellon, so being the inventor of said improvement, and
16 being a citizen of the United States aforesaid, made application to the proper department of the Government of the United States for letters patent therefor, in accordance with the then existing laws of Congress, and having duly complied in all respects with the conditions and requisitions of said laws, on the 2d day of October, A. D. 1866, letters patent of the United States, signed, sealed, and executed in due form of law, for his invention or discovery, were issued to the aforesaid Edward Mellon, whereby there was secured to him, his heirs, executors, and assigns, for the term of seventeen years from the 2d day of October, 1866, the full and exclusive right of making, using, and vending to others to be used the said improvement, as specified and set forth in said letters patent, now on record in the Patent Office of the United States, which, or an exemplified copy of which, your orators will produce as your honors may direct.

And your orators further show unto your honors that on or about the 17th day of November, 1869, the said Edward Mellon, by an assignment in writing of that date, sold, assigned, and transferred unto the said William Matthews one equal undivided half part of all the right, title, and interest in and to said letters patent and invention, which said assignment was duly recorded in the Patent Office of the United States, November 22, 1869, in liber A 12, page 423, as by said assignment, or a duly authenticated copy thereof, and the certificate of such recording thereto affixed, ready in court to be produced, will fully and at large appear.

And your orators further show unto your honors that the said defendants, prior to the last day of April, 1867, acknowledged and acquiesced in the value of said invention and the rights of the said Edward Mellon under the said letters patent, and both before and since the date last aforesaid applied the said improvements to large and extensive use, and on all tires and wheels containing the
17 said improvements made for and used by the said defendants between the issue of said letters patent and the said last day of April, 1867, they, the said defendants, so made, used, and applied the same by and with the permission, license, and consent of the said Edward Mellon, paying him therefor a certain stipulated sum of money upon each of such tires and wheels so made by them; but the said defendants, since the said last day of April, 1867, have continued to make, use, and apply the said improvements without the license, permission, or consent of the said Edward Mellon, or of your orators, refusing to pay any royalty, license fee, or damage therefor, all of which last-mentioned acts are contrary to the rights of your orators under the said letters patent and assignment, and in infringement thereof.

And your orators further show unto your honors that the said Edward Mellon did, on the 11th day of April, 1868, file his bill of complaint against the Lehigh Valley Railroad Company, in the circuit court of the United States in and for the eastern district of Pennsylvania, in equity, to April sessions, 1868, No. 2, charging the said defendants therein named with having made, used, and applied the said patented improvements in violation of said letters patent and infringement of the rights of the said Edward Mellon thereunder; to which bill of complaint the said Lehigh Valley Railroad Company filed an answer setting forth certain defences, to wit, a denial of the validity of said letters patent for want of novelty, and that the said patentee was not the true, original, and first inventor thereof, and not entitled to the relief prayed for in his bill for divers other reasons therein set forth; to which a replication was filed by the said complainant denying the truth of the said averments of the said defendants; and thereupon proofs were taken, and the said cause was so proceeded with that the said circuit
18 court, on the 7th day of October, 1874, rendered a decree in favor of the said complainant, declaring the said letters patent to be valid, and that the said defendants therein had violated and infringed upon the exclusive rights of the said complainant thereunder, and ordering an injunction to issue restraining the said defendants from the further violation and infringement thereof, and directing a reference to a master to take an account of the gains and profits made and received by the said defendants from such infringement, together with the damages the said complainant had sustained thereby, and ordering and decreeing that the complainant recover the same of the said defendants, together with the costs of suit.

And your orators further show unto your honors that said invention has been, and is, of great practical use and benefit to your orators, and that they have applied the said improvements to large and extensive use, and that the public and the users of said improvements have acknowledged and acquiesced in the value of said invention and the aforesaid rights of your orators under said letters patent, and that your orators have been, and but for the infringement hereinafter complained of would still be, in the undisturbed possession, use, and enjoyment of the exclusive privileges secured by the said letters patent and in receipt of the profits of the same.

And your orators further show unto your honors, as they are in-

formed and believe, that the said defendants hereinafter named, well knowing all the facts hereinbefore set forth, but contriving to injure your orators and to deprive them of the benefits and advantages which might, and otherwise would, accrue to them from said invention and letters patent, have been, and now are, wrongfully and unlawfully constructing and using the said patented improvement, in some parts thereof substantially the same in construction and operation as in the said
19 letters patent mentioned, the exclusive right and privilege to make and use which, and vend the same to others to be used, are thus by law vested in your orators.

But so it is, may it please your honors, that the said defendants, as your orators are informed and believe, without the license of your orators, against their will, and in violation of their rights, have, since the last day of April, 1867, made and used, and intend to continue still to make and use, the said improvement within the western district of Pennsylvania, all of which is in violation of the said letters patent and assignments.

To the end, therefore, that the defendants may, if they can, show reason why your orators should not have the relief hereby prayed, and that they may make a full disclosure and discovery of all the matters aforesaid, and upon their several corporal oaths, and according to the best and utmost of their knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are required to answer, that is to say:

I. Whether the said original letters patent were granted and issued to the said Edward Mellon and one-half interest therein assigned to the said William Matthews, and the whole right, title, and interest therein now vested in the complainants, as hereinabove mentioned?

II. Whether the said defendants, their agents, servants, and employees, have, or any or which of them has, at any time, and, if so, when and where and during what period of time, made, constructed, sold, or used any, and, if so, how many, tires or wheels substantially similar in any, and, if so, in what, respect to the tires or wheels or the mode of attachment described in the letters patent above mentioned, and at what profit have the same been so made, constructed, sold, or used?

20 III. Whether the tires or wheels, or mode of attachment of the same, made, constructed, sold, or used by the said defendants, differ in construction, mode of operation, or otherwise, in any, and, if so, in what, substantial and material respect from the tires or wheels, or mode of attachment of the same, described in said letters patent, and, if so, describe minutely and in detail all such differences?

And now, to the end that the defendants may be compelled to account for and pay over the income thus unlawfully derived from the violation of the rights of your orators as above, together with the damages the complainants have sustained thereby, and be restrained from any further violation of said rights, your orators pray that your honors may grant a writ of injunction restraining the defendants, their servants, agents, and employés, from any further construction or sale or use in any manner of said patented improvement, or any part thereof, in violation of the rights of your orators as aforesaid, and that the tires and wheels now in possession or use of the said defendants may be destroyed or delivered up to your orators for that purpose. And your orators pray for such other relief as the equity of the case may require and to your honors may seem meet.

May it please your honors to grant unto your orators not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna of the United States of America, directed to the said Delaware, Lackawanna and Western Railroad Company, and commanding them to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the court shall seem meet, and be required by the principles of equity and good conscience.

FURMAN SHEPPARD,
Solicitor for Complainant.

21 The defendants are required to answer each of the foregoing interrogatories numbered one to three each, inclusive.

FURMAN SHEPPARD,
Solicitor for Complainant.

On the 19th day of January, A. D. 1875, before the subscriber, came Edward Mellon, one of the complainants in the foregoing bill named, who, being duly sworn, says that so far as the statements therein contained are within his own knowledge they are true, and so far as they are derived from the information of others he verily believes them to be true. And he further says that he verily believes he, the said Edward Mellon in said bill named, to be the original, true, and first inventor of the new and useful improved mode of attaching tires to wheels of locomotives, which is described in the letters patent granted to him, and mentioned in the foregoing bill. And your deponent verily believes that the title of them, the said complainants, as set forth in said bill is true.

EDWARD MELLON.

Sworn and subscribed before me this 19 day of January, 1875.

HEPBURN McCLURE, *Clk.*

Filed Jan'y 19, 1875.

22 *Plea.*

Circuit court of the United States in and for the western district of Pennsylvania. In equity.

EDWARD MELLON AND WILLIAM MATTHEWS
vs.
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

The plea of The Delaware, Lackawanna and Western Railroad Company, the above-named defendant, to the bill of complaint of Edward Mellon and William Matthews, the above-named complainants.

The said The Delaware, Lackawanna and Western Railroad Company, by protestation, not confessing all or any of the matters and things in the said bill mentioned to be true, in such manner and form as therein set forth and alleged, to all the relief and to all the discovery sought for and prayed against the said The Delaware, Lackawanna and Western Railroad Company, the defendant herein by the said bill, plead in bar to the said bill, and for a plea say that on, from, and after the last day of April, in the year eighteen hundred and sixty-seven, to the time of the making and delivery to the said defendant by the said Edward Mellon of the deed poll hereinafter mentioned and

and stated, to wit, to the 15th day of May, in the year eighteen hundred and sixty-seven, the said The Delaware, Lackawanna and Western Railroad Company did not make or apply the said the new and
23 useful improvement to any locomotive nor to any tire or wheel of any locomotive whatsoever; and that heretofore, to wit, on the 15th day of May, eighteen hundred and sixty-seven, to wit, at Scranton, in the said State of Pennsylvania, the said Edward Mellon, one of the said plaintiffs, did make, sign, sell, and deliver unto the said defendant his, the said Edward Mellon's, certain deed poll, bearing date the day and year last aforesaid, and sealed with his seal, and to the court now here shown, in and by which deed, and as therein stated, he, the said Edward Mellon, for a valuable consideration, to him in hand paid by the said The Delaware, Lackawanna and Western Railroad Company, at or before the execution of said deed, the receipt whereof he did thereby acknowledge, did declare that he had granted, bargained, sold, assigned, and conveyed, and in and by the said deed he did grant, bargain, sell, assign, and convey to the said defendant, its successors and assigns, the full, free, and perfect right and privilege of making, applying, and using upon all the locomotives, locomotive tires, and wheels that there were, or thereafter might be, owned or used by said defendant, its successors or assigns, the said new and useful "improved mode of attaching tires to wheels of locomotives," for which a patent was granted and issued to him, the said Edward Mellon, from the Patent Office of the United States, dated the 2d day of October, 1866, No. 58447 (being the same improvement mentioned in said bill of complaint), to have and to hold the said right and privilege unto the said defendant, their successors and assigns, for and during the full term and period for which the said "letters patent" were granted, as by said deed poll, reference being thereunto had, will appear.

And the said defendant, in fact, further saith that since the making of and delivery to it of the said deed poll, to wit, on or since the
24 fifteenth day of May, eighteen hundred and sixty-seven, it has not applied or used the said improvement upon any locomotive, locomotive tire, or wheel except upon locomotives, locomotive tires, and wheels that then were or since then have been owned or used by it, the said defendant, it' successors or assigns, and during all the time last aforesaid it, the said defendant, has not made the said improvement for any purpose or use whatsoever except to apply the same to locomotives, locomotive tires, and wheels that there were or since then have been owned or used by the said defendant, its successors or assigns, pursuant and according to the provisions, force, and effect and the true intent and meaning of the said deed poll.

All which matters and things the said defendant avers to be true, and pleads the same in bar to the whole of the discovery and relief sought for and prayed by the said bill, and humbly demands the judgment of this honorable court in respect thereof, and whether it, the said defendant, ought to be compelled to make any further or other answer to the said bill, and prays to be dismissed in respect thereof with its costs and charges in this behalf sustained.

UNITED STATES OF AMERICA,
Southern District of New York,
County and City of New York, ss:

Be it remembered that on this 24th day of March, 1875, before me, Edward L. Owen, a United States commissioner, personally appeared Samuel Sloan, of said city, who, being by me duly sworn according to

law, on his oath did say that he is the president of The Delaware, Lackawanna and Western Railroad Company, the defendant named in the foregoing plea; that said plea is not interposed for delay, and that it is true in point of fact.

SAMUEL SLOAN.

Sworn and subscribed before me the day and year and at the place above stated.

[SEAL.] EDWARD L. OWEN,
United States Commissioner for the Southern District of New York.

We do hereby certify that, in our opinion, the foregoing plea is well founded in point of law.

ARMSTRONG & LINN,
Counsel for The Delaware, Lackawanna and Western Railroad Company.

APRIL 5, 1875.

Filed April 5, 1875.

United States circuit court, western district of Pennsylvania, at Williamsport.

EDWARD MELLON AND WILLIAM MATTHEWS
vs.
THE DELAWARE, LACKAWANNA AND WESTERN R. R. Co.

June term, 1875. No. 18. In equity.

Replication of Edward Mellon and William Matthews, complainants, to the plea of The Delaware, Lackawanna and Western Railroad Company, defendants.

These repliants join issue with the said defendants upon the matters of facts alleged in their said plea filed, and the said complainants will maintain and prove their said bill to be true, certain, and sufficient in the law, and that the said plea of the said defendants is uncertain, insufficient, and untrue; all which matters and things these repliants are ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

FURMAN SHEPPARD,
Of Counsel with Complainants.

Filed April 22, 1875.

Circuit court of the United States in and for the western district of Pennsylvania. In equity.

EDWARD MELLON AND WILLIAM MATTHEWS
vs.
THE DELAWARE, LACKAWANNA AND WESTERN R. R. Co.

The parties having heretofore stipulated and agreed that witnesses in behalf of either of said parties might be produced and examined herein on the 9th day of June, 1875, before Thomas H. Rodman, esq., as commissioner, and the parties and their witnesses having appeared before said Rodman pursuant to said stipulation and agreement, now it is further stipulated and agreed that the said witnesses may be sworn

before a notary public, and their depositions taken before said Thomas H. Rodman, and when certified by said Rodman to have been so taken may be used in evidence upon the trial or hearing of this action by either party, with the same effect and force as if the same had been taken in strict conformity with the rules and practice of this court; and all objections to the manner of swearing the said witnesses, and of examining them, and of certifying the said depositions are hereby waived.

And the foregoing stipulation and agreement shall apply to and cover any depositions of witnesses taken herein before Thomas H. Rodman on any day subsequent to said 9th day of June, 1875, when counsel for both are present.

H. T. FENTON,
Of Counsel with Complainants.
ARMSTRONG & LINN,
Defendant's Solicitors.

JUNE 9, 1875.

And it is further stipulated and agreed that a copy of Defendant's Exhibit 1, testified to by Mr. Brisbin, certified to be a true copy by the said commissioner, may be annexed hereto and be read in evidence at the hearing or trial of this action in the place of the original.

H. T. FENTON,
Plaintiffs' Attorney.

28 *Defendant's testimony.*

Circuit court of the United States in and for the western district of Pennsylvania. In equity.

EDWARD MELLON AND WILLIAM MATTHEWS
vs.
THE DELAWARE, LACKAWANNA AND WESTERN R. R. Co.

Depositions of witnesses examined before Thomas H. Rodman, commissioner, under and pursuant to the foregoing consent and stipulation.

JOHN BRISBIN, sworn as a witness on behalf of the defendant, says:

Q. (Witness produces paper purporting to be the license set forth in the defendant's plea.) Are you one of the subscribing witnesses to that paper?

A. Yes, sir.

Q. Were you present at its execution?

A. Yes, sir.

Q. Did you see it subscribed by Mr. Edward Mellon?

A. Yes, sir

Q. When did you subscribe your name as subscribing witness?

A. Immediately after Mr. Mellon signed it, and in his presence.

Q. Do you know Mr. John B. Lownesbury?

A. I did know him at the time this paper was drawn; he wrote it under my dictation, as my clerk, and signed it as a subscribing witness immediately after its execution by Mr. Mellon, and in his presence, at my then office in Scranton, Pennsylvania.

Q. Do you know his signature, and is that his written directly above yours?

29 A. I know his signature, and saw him sign his name to the paper as a witness, and that is the signature.

Q. Where is Mr. Lownesbury at this time?

A. I do not know; I think it is two or three years since I have seen him or known anything of his whereabouts.

(Defendant's counsel offers paper in evidence, and plaintiffs' counsel objects.)

Cross-examined:

Q. In whose possession has this paper been since the date of its alleged execution?

A. It has been kept among the papers of the Delaware, Lackawanna and Western Railroad Company.

Q. By whom has it been kept for the company?

A. All such papers are usually kept and considered to be in the custody of the secretary of the company, and I am not aware that the keeping of the paper has been otherwise.

Q. Who were present at the time of the alleged execution of this paper?

A. I do not recollect that any other persons than Mr. Mellon, Mr. Lownesbury, and myself were present, yet I would not say others were not in the office.

Q. Where was it signed by the parties?

A. At my office, in Scranton, Pennsylvania; I was then the president of the Delaware, Lackawanna and Western Railroad Company, the defendants in this suit, and had my office at that place.

Q. Did you personally keep possession of the paper after you had signed it as a witness?

A. My recollection is that the paper was kept by my clerk, in the safe in my office, among other papers, until the papers of the company under my control were removed to the New York office and placed in the custody of the secretary of the company, which removal, to a

30 very considerable extent, took place in the early part of 1869, when my office was removed to New York, though many papers that I had had in my charge were left at Scranton, and it is impossible for me to say when this paper was sent to the New York office; very many of the papers which I had at Scranton are still for convenience sake left there.

Q. Do you know whether or not the company defendants ever gave any consideration whatever for this paper?

(Objected to.)

A. I knew all about the consideration that moved Mr. Mellon to make the paper, and regarded it as a valuable consideration. (The last clause objected to as not responsive.) I am still an officer of that company—the counsel and general adviser.

Paper marked Exhibit of Defendant 1, T. H. R., commissioner.

J. BRISBIN.

Subscribed and sworn to by the witness, John Brisbin, before me, June 9, 1875, at the city of New York.

[SEAL.]

W. EDWARD, JR.,
Notary Public, N. Y. C. and Co.

31 DEFENDANT'S EXHIBIT I.

Know all men by these presents that I, Edward Mellon, of Scranton, Pennsylvania, for a valuable consideration to me in hand paid by the Delaware, Lackawanna and Western Railroad Company at or before the execution hereof, the receipt whereof I do hereby acknowledge, have granted, bargained, sold, assigned, and conveyed, and by these presents do grant, bargain, sell, assign, and convey, to said company, their successors and assigns, the full, free, and perfect right and privilege of making, applying, and using upon all the locomotives, locomotive tires, and wheels that now are or hereafter may be owned or used by said company, their successors or assigns, the new and useful "improved mode of attaching tires to wheels of locomotives" for which a patent was granted and issued to me from the Patent Office of the United States, dated the second day of October, 1866, No. 58447, to have and to hold the said right and privilege unto the said company, their successors and assigns, for and during the full term and period for which the said letters patent were granted.

In witness whereof I have hereunto set my hand and seal, at Scranton, in the State of Pennsylvania, this the 15th day of May, A. D. 1867.

EDWARD MELLON. [L. S.]

Witnesses present:
JOHN LOWNESBURY,
J. BRISBIN.

[Revenue five cents.]

I, Thomas H. Rodman, commissioner, do hereby certify that I have compared the foregoing paper with the original paper produced and deposed to by the witness, John Brisbin, in his foregoing deposition, sworn to June 9, 1875, and which was put in evidence by the defendants in the action in which said deposition was made, and marked and designated as "Exhibit of Defendant 1, T. H. R., commissioner," and that the same is a true and correct copy of the said original paper or exhibit, and of the whole thereof.

THOMAS H. RODMAN,
Commissioner.

NEW YORK, *June* 10, 1875.

32 *Plaintiffs' testimony.*

Circuit court of the United States in and for the western district of Pennsylvania. In equity.

EDWARD MELLON AND WILLIAM MATTHEWS
vs.
THE DELAWARE, LACKAWANNA AND WESTERN Railroad Company.

EDWARD MELLON, sworn as a witness on behalf of the plaintiffs, says:

Q. You are one of the plaintiffs and the patentee named in the letters patent mentioned in the bill of complaint in this case?

A. I am.

Q. Say whether or not, at the date of the patent, you were in the employ of the defendant, and when you left their employ.

A. I was in their employ, and I left somewhere between the 6th and 12th of April, 1867.

Q. State whether or not the corporation defendant at that time had been and were using your patented improvement; and, if so, whether or not they paid you royalty therefor up to the time you left their employ.

A. The defendants had been using my improvement from latter part of September, 1865, up to about 1st of April, or sometime in March, 1867, and paid royalty for the use of the patent up to that time.

Q. State, if you can, how the amount of that royalty was ascertained, and how paid.

(Objected to.)

A. The amount was bargained for by Mr. Brisbin and myself,
33 and included all the improved tires in use on their road up to that date until they were worn out. That amount or sum agreed upon was two hundred and forty-six dollars, and it was paid to me in cash, for which I indemnified them—I mean released them from all claims for infringement up to that date.

Q. After you left their employ, and this settlement for past use had been made, state whether or not any negotiations were opened between you and any officer of the corporation defendants to continue the further manufacture and use of this improvement by the latter on their railroad.

(Objected to.)

A. Yes, sir; there were.

Q. Please state all the circumstances.

(Objected to.)

A. The negotiations commenced at the time we made the settlement—negotiations for future use; the negotiations for the use of the patent for the whole term, and for the whole road, were between Mr. Brisbin and me; but we could not agree as to price at the first meeting; then I met him again, at his office I presume (in Scranton), and he told me that I could put that patent on their engines as much I wanted to, but they would not pay for it until they made a bargain for the future, or ordered me to put them on; I done all that kind of work—that is, putting tires on wheels—while I was in the employ of the company by contract, at so much a tire; that's all I meant when I said I was in their employ; then I gave Mr. Brisbin notice, also Mr. Watts Cooke, superintendent of rolling stock of the defendants, that I would not put on any more tires after I had finished the work I had on hand, and they could put the tires on just as they pleased, at their own risk.

Examination of the witness adjourned, by consent of counsel, to the 10th June, 1875.

JUNE 10, 1875.

Examination of witness, under the foregoing stipulation, was resumed.

34 Mr. Edward Mellon's direct examination was continued as follows:

Q. Take up the narration at the point of your first interview with Mr. Brisbin, with reference to the future use by defendants of your invention.

(Objected to.)

A. I had a further negotiation with Mr. Brisbin; my price for their road for the whole time of the patent was five thousand dollars; Mr. Brisbin thought that was too high a price; then, in order to meet him

in price, I proposed to allow his company an offset of fifteen hundred dollars, and charge it to a certain engine called the Pascono, on which my tires fastening had been experimented with; the engine belonged to Mr. Brisbin's company; the balance of the five thousand dollars—that is, thirty-five hundred dollars—the company should pay me in money; Mr. Brisbin and I then talked over what rights the company would have under that proposed agreement; Mr. Brisbin then made notes, and said that he would draw up papers to that effect and submit them to me; I came the next day, and he had the paper drawn according to my proposition. (Witness refers to Defendant's Exhibit I, testified to by Mr. Brisbin, and says:) This is the paper I refer to as drawn up by Mr. Brisbin and submitted to me; I noticed that the paper had value received written on the fore part of it, and I asked Mr. Brisbin if he would pay me then, and he said he couldn't; that he would have to submit it to the board of directors for their approval or rejection (objected to); then I refused to sign the paper at that time; then Mr. Brisbin said that he would not submit it to the board if I did not sign it; that they would not pay any attention to it; then I left the office and went out and thought the matter over a good deal, and concluded that Mr. Brisbin was right (objected to); that my signature would only submit my condition to the company; then I went back, the same day
35 I think, to Mr. Brisbin's office at Scranton, and told him that I would sign that paper and entrust him to submit to the board of directors; I then left the office and thought the matter over again, and thought Mr. Brisbin wished to cut me down in price, by his hesitation and saying that he could not pay (objected to); then I went back to his office the same day and said him, "Mr. Brisbin, if you will pay me today, I will throw off five hundred dollars more and take three thousand dollars;" he said, "I cannot do it without the consent or approval of the board of directors;" then I said, "Then that is all right; three thousand five hundred dollars is my price to submit to the board with the paper;" those prices were all verbally to Mr. Brisbin; I furnished him a small pair of models to take with him to New York, and some circulars of the patented improvement, which he took; I then left his office, and came back again to his office at Scranton a few days after the board of directors had met at New York; I then went to learn whether the board of directors had accepted my proposition or not; Mr. Brisbin told me that their coal sales had been too low, and that the board had discussed the matter of the price of coal until the time of adjournment, and did not reach my matter; it then laid over to be submitted to the board at their next monthly meeting; after the next meeting I came to Mr. Brisbin's office, when I thought he would be home from New York, to learn what the board had done with regard to my submitted proposition; Mr. Brisbin said he had been sick and had not been at the board, and therefore had not submitted it; I then went away and came back another time, either the next month or the month following that, I am not sure which, to learn what the company had done with my proposition; Mr. Brisbin told me that he had met Robert H. Sayre, of the Lehigh Valley Railroad, who asked him whether they were using Mellon's patent on the Delaware, Lackawanna and Western Railroad; Mr.
36 Brisbin said they were; Mr. Sayre asked him if they were paying for it; Mr. Brisbin said they were; Mr. Sayre then said that the Lehigh Valley Road was using that invention on their road, but that they did not intend to pay for it; that they intended to fight him; then Mr. Brisbin told me that he could not submit my proposition to the company and advise them to pay for it, as other companies were

using it, and were not going to pay for it; that "our people would say I was a fool;" then I told Mr. Brisbin that I would give his company bonds to refund the money back with interest in case I did not establish the validity of my patent against the Lehigh Valley, or any other company; Mr. Brisbin said his company would not do business that way; that they did not mind paying for it, but they wanted to be sure that other parties paid for it also; then I intimated to Mr. Brisbin—I don't remember the exact language—that I might as well sue them as sue the Lehigh Valley; then Mr. Brisbin said, "I wish you would not interfere with our company," that "we will use it anyhow, and if it is all right we will use it anyhow," and he said, "You go down to the Lehigh Valley folks and get a settlement from them, and I will not ask you what price they paid; if they will only recognize the validity of your patent, and take a license from you, then I will advise our people to settle up;" then I went down and tried to get a settlement with the Lehigh Valley; they put me off from time to time to about the 11th of April following, when I filed a bill in equity against them for an infringement of my patent; I then went to New York City, and had an interview with William E. Dodge, one of the directors of the Delaware, Lackawanna and Western Railway Company (objected to); I afterwards called upon Mr. Brisbin, at his office in Scranton, after he had ceased to be the president of the defendants, and said to him

37 that I had had a conversation with Mr. Dodge, in New York, about my matter, and that Mr. Dodge requested him (Brisbin) to bring the matter before the board; this was in April, 1868; Mr. Brisbin said he would bring it before the next board; I came to his office in Scranton after the next meeting of the board of directors in New York, to learn whether the board had accepted my propositions; Mr. Brisbin told me that the board had taken the matter up and debated it, and had authorized him to say to me that they would pay me two hundred and fifty dollars if I would take it, and waive any question as to the validity of the patent; I told Mr. Brisbin that I would not accept two hundred and fifty dollars, and that, when I had established the validity of my patent, the Delaware, Lackawanna and Western Company would have to pay retail prices during the term of the patent, and that I regarded them as being as great an enemy as the Lehigh Valley; then Mr. Brisbin said, "If you charge us too much for it, why we'll take it off;" and I told Mr. Brisbin that there was not a man on the road that would dare to take the responsibility of saying, "We'll cease to use this," meaning legal liabilities for recklessness in running tired wheels without it (objected to); Mr. Brisbin at first demurred, but finally acknowledged that he would not take the responsibility of saying so; then I abandoned all further attempts to negotiate with that company; the company defendants never accepted the terms of my proposition.

Q. State whether or not it was understood and agreed between you and Mr. Brisbin at the time you signed this paper Exhibit I that it was a mere submission of terms, and not to take effect as a license unless accepted by the company upon the conditions offered by you.

(Objected to.)

A. It was most certainly so on my part—a mere submission of terms—and if accepted I was to receive three thousand five hundred dollars in cash, and if rejected the paper was to be null and void.

38 Q. State whether or not you ever received the sum of thirty-five hundred dollars, or any other sum of money, from the company defendants for the use of this patent on their road since the settlement with them in March or April, 1867?

(Objected to.)

A. No; I have received no money from them for that purpose, or any other valuable consideration.

Q. State whether or not you notified the defendants after the decision of your Lehigh Valley case.

A. I did; on October 24, 1874, I wrote a notice to Samuel Sloan, president of the corporation defendants, enclosing a printed copy of the decree of the court in my Lehigh Valley railroad case, and requesting Mr. Sloan to account for the use of the tires on his road.

(Objected to.)

Cross-examined:

Q. How long were you in the service of these defendants?

A. I came there on the 14th of September, 1855, and I left some time in the month of April, 1867.

Q. Were your duties the same, speaking generally, during all the time you were there?

A. No, sir; at first I supposed I was there as a first-class machinist, and did whatever parts of their locomotive work that was given to me by their master mechanic; this continued until 1857 or 1858; about that time, in the latter part of 1857 or 1858, I made a bargain with Watts Cooke, the defendant's master mechanic, to do their locomotive tire and wheel work, at prices, for so much a piece; that arrangement continued down to the time I left in 1867; during this period of contract work I sometimes did other work for the company not included in my contract, for which they paid me by the hour (objected to). My arrangement with Mr. Cooke was that for this extra work I was to be paid at the highest rate of wages paid in the shop.

39 Q. Did you invent this improvement during the time you were, as before mentioned, in the service of the company?

(Objected to.)

A. I did.

Q. What was the date of the perfection of this improvement by you?

(Objected to.)

A. I cannot tell the exact date, but I made the models and drawings for it some time in the month of July, 1865.

Q. Did you from time to time experiment upon this improvement, and test those experiments upon the locomotives of the defendants?

(Objected to.)

A. No, sir; I did not make any experiments at all until my invention was completed—the models prepared and filed in the archives of the office in Washington—at least I suppose so, for the papers went into Munn & Co.'s hands sometime in August, 1865; I put no tire on the defendant's road until the latter part of September, 1865.

Q. Do you mean to say that you never applied this improvement to the tires on any locomotive on the defendant's road until after your papers were filed at Washington?

A. I do mean to say that.

Q. Did you ever apply the improvement to the tires of any locomotive on any railroad before you filed your papers?

A. I did not.

Q. Did you not, of your own motion, or pursuant to your request, first apply this improvement upon the locomotives of the defendant?

(Objected to.)

A. I did not put them on of my own motion, but I made a sketch of the invention and shewed it to James Cooke while he was the master

mechanic of that road, and in talking with him he gave his permission, consent, or orders, I don't know which, to put it on the next engine I put tires on.

Q. Did you not ask his permission to apply it?

(Objected to.)

40 A. I don't know that I did, but I may have.

Q. Were not all these improved fastenings that were put on up to the time you left the service of the company put on by your permission and desire?

(Objected to.)

A. Yes, sir; they were put on by me; it was with my permission, and, of course, I desired it; they were put on by me.

Q. Did you, at any time previous to the time you left the defendant's service, make any claim or indicate to any officer of the company that you intended to make any claim against the company for the use of this improvement, and, if so, to what officer did you indicate such intention?

(Objected to.)

A. I did not at all talk to any officer about this thing.

Q. Who, if any one, was present at any of the interviews you have mentioned as having taken place with Mr. Brisbin in reference to this matter?

A. The first interview I had with Mr. Brisbin was by his orders; he sent to me at the shop to go over to his office; Mr. Watts Cooke accompanied me to the office, and was present during all my first interview with Mr. Brisbin; I don't remember that any one was present at any of the interviews except that Mr. Lownesbury was present at the time the paper Exhibit 1 was drawn.

Q. Will you please fix as nearly as you can the date of your interview you have spoken of with Mr. W. E. Dodge?

A. My impression is that it was in the month of April, 1868; that is the best of my recollection.

Q. You speak of having given notice to Watts Cooke and Mr. Brisbin in reference to the further use of this improvement; when and where was that notice given, and was it written or verbal, and was it given to both together or to each separately?

A. It was given at the first interview with Mr. Brisbin I have

41 spoken of, at which Mr. Watts Cooke was present; it was a verbal notice and given to both at that time.

Q. State whether or not there was some unpleasantness between you and Mr. Watts Cooke at the time you left the service of the company.

(Objected to.)

A. Not the least.

Q. Have any letters passed between you and any officer of the defendants having any reference to your improvement or invention, or the use thereof by the defendants?

A. None prior to the notice of October, 1874.

Q. Up to the time of the settlement in 1867 how many tires had this improvement been applied to on the defendant's road?

A. We did not know exactly at that time; there were probably one hundred tires with this improvement in use then on the defendant's locomotives.

Q. Was not the settlement of which you speak, at the time the $246 was paid to you, a matter of compromise? Did not you claim more, and did not Mr. Brisbin object to paying anything on the ground that

you had gotten up this improvement while in the company's service, and used the tools, material, and facilities of the company in so doing?

(Objected to.)

A. Those things were all talked over; the settlement, certainly, was a matter of compromise for what had already been used; I claimed more—I claimed ten dollars a tire for what was in use; Mr. Brisbin did object to paying anything; the grounds of his objection were those stated in the question.

Q. (Witness is shown Defendant's Exhibit 1.) Did you sign that paper; is that your signature?

(Objected to.)

A. I did sign it; that is my signature.

EDWARD MELLON.

Subscribed and sworn to by the witness, Edward Mellon, June 10, 1875, before me, at the city of New York.

[SEAL.]

W. EDWARDS, JR.,
Notary Public, N. Y. C. and Co.

42 *Defendant's testimony in reply.*

United States circuit court, western district of Pennsylvania. In equity.

EDWARD MELLON AND WILLIAM MATTHEWS *vs.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY. } Of June term, 1875. No. 18.

JOHN BRISBIN, recalled for the defendants, testifies:

Mr. Mellon, one of the plaintiffs, I know was in the employ of the defendants; do not know how long; presume his statement in that respect is correct; about or immediately after the time of his leaving defendants' employment he made a claim for the use of this improvement by defendants, which I objected to pay, for the reasons that the improvement had been gotten up by him while in the service of the company, and that, as I alleged, he had used their tools, materials, and facilities in perfecting it, and that at his own instance it had been applied to the defendants' locomotives; finally the matter was compromised by paying, as shown by the voucher of April 3, 1867, plaintiffs' Exhibit A, about, I think, one-quarter of the amount Mr. Mellon claimed; I then told Mr. Mellon that we would not continue to use his improvement if we had got to pay for the use of it, as I considered that, for the reasons I gave in objecting to the payment of his claim for previous use, he ought not to charge us for the use of it, and that I would not have the improvement applied upon any more of the

43 company's locomotives until he gave the company a license to use it; he said that if we quit using it it would prejudice the sale of the improvement to other companies, because the first question they would ask him, after ascertaining where he had been employed, would be whether the Delaware, Lackawanna and Western Railroad Company were using it, and he wanted to know if I would not bring the matter before our board of managers; I told him that if he would give in the right to use his improvement I would submit the matter to the board, whether the company should pay him anything, and, if so, how much; I think he went out and came in again to my office, per-

haps two or three times the same day, and wanted me to promise to make him some promise; I wholly refused to make any promise, but told him if he executed the license I would submit the matter to the board; the license (Defendants' Exhibit I) was drawn in my office, by my clerk, under my dictation, and I think it was dictated and drawn while Mr. Mellon was sitting in the office, and it was signed by him, subject to no condition, agreement, or understanding, other than that I was to see whether the defendants' board of managers would or would not agree to give him anything; between the time of the execution of this paper (Defendants' Exhibit I) and the next meeting of our board, which was on the 31st day of May, 1867, Mr. Mellon, as I think he informed, and as I know Mr. William E. Dodge did, called upon Mr. Dodge; this was in May, 1867; at the meeting of the board, on the 31st day of May, 1867, I brought the matter before the board, and they passed a resolution authorizing me to pay Mr. Mellon for the use of this improvement upon all the locomotives of the company such sum as I thought proper, not exceeding one thousand dollars.

(Plaintiffs' counsel calls for production of official minutes.

44 It is agreed that defendants shall furnish a certified copy of the resolution referred to.)

In submitting this matter to the board, as above stated, I stated that Mr. Mellon had executed and delivered to me a license to use this improvement, with the understanding that I was to submit the matter to the board for the purpose of ascertaining what, if anything, should be paid him; the license (Exhibit I) was not executed or delivered under any understanding or agreement that unless a certain sum or any sum was paid to Mellon it was to be void; it was an absolute delivery of the paper, subject to no contingency save only the will of the company; before my return to Scranton, after having met the board on this occasion, or at least before I again saw Mr. Mellon, I heard that the validity of his patent was questioned by the Lehigh Valley Railroad Company, and when I met Mr. Mellon I so told him, and told him that as to what the company would pay him—that was referred to me, with power—but that, whatever I might conclude to give him, I would give nothing until the validity of his patent was established; he pressed me to give him something then to aid in the payment of the expenses he expected to incur in the prosecution of his claim against the Lehigh Valley, but I refused to do so; and there the matter ended, with the exception that I think he, and others in his behalf, at perhaps different times, afterwards requested me to make some further remuneration for the use of this improvement, which I always refused to do, claiming that there was no legal liability.

Q. Mr. Mellon has stated that, at an interview he had with you soon after he left the defendants' employ, he mentioned the sum of $5,000 as a compensation to him, and that he would consent that $1,500 of that sum should be charged to a certain engine called the Pocono, and that he would accept $3,500 in cash; was any such proposition at any time submitted to you by him?

45 A. My recollection would be that Mr. Mellon's asking price for the whole road was $5,000, but I have not the slighest recollection of anything about the deduction of $1,500 on account of the locomotive Pocono, or any other locomotive; there was never any such conversation between Mr. Mellon and myself as he has testified to, to the effect that he noticed the paper had value received written in it, and that he asked me if I would pay him then, and that I said I couldn't,

or that I would have to submit it to the board for approval or rejection—nothing of the kind.

Q. Did he, at any time, say to you that he would sign that paper (Plaintiffs' Exhibit I), and entrust it to you to submit to the board of directors?

A. Never.

Q. Did he, as he has sworn, say to you at or about the time the agreement was signed by him, or at any time, that if you would pay him then he would throw off five hundred dollars and take three thousand dollars?

A. I have no recollection of any such thing at all; at the time the paper was signed and delivered there was nothing said as to any specified amount; I was to see what the board would give him, if anything; I could not have told him that his matter, at our meeting of the board, was not reached, that the board had discussed the matter of the price of coal until the adjournment, because his matter was brought before the board at its very first meeting after the paper was executed; so with reference to his statement that, on another occasion, I told him that I had not submitted his proposition because I had been sick, it is not so; with reference to Mr. Mellon's account of a conversation with me in which I spoke of a conversation I had had with Robert H. Sayre, I will say I do not know whether I told Mr. Mellon that I had met Sayre; I did tell him that I had been informed that the Lehigh Valley
46 Company questioned the validity of his patent; I did not say that I told Mr. Sayre that we were paying for the use of this improvement; very likely I told Mr. Mellon that if I was to give him anything until the validity of his patent was settled our people would say I was a fool, although I have no recollection of the details of that conversation as given by Mr. Mellon; I do not recollect now; that at that time Mr. Mellon was very anxious that I should give him then five hundred dollars to assist in defraying his expenses against the Lehigh Valley, but I refused to give him anything.

Q. Mr. Mellon says that he called upon you after a meeting of your board of directors, and that you told him that the board had taken the matter up and debated it, and had authorized you to say to him that they would pay him $250 if he would take it. Did you at any time make any such statement to him?

A. I did not; Mr. Mellon did not at any time furnish me with a pair of models for any purpose, to my recollection, or circulars to bring to New York; I have no recollection that the sum of $3,500 was ever mentioned between Mr. Mellon and myself in connection with this matter; there was no understanding or agreement that the sum of $3,500, or any sum, was to be submitted to the board in connection with the paper (Exhibit I), nor was it understood or agreed that the paper itself was to be submitted to the board; the only thing that was to be submitted to the board was the question whether they would pay him anything, and, if so, how much; the paper was absolutely delivered without reference to any future contingency.

Defendants produce book of minutes of proceedings of board of managers of defendants, on May 31, 1867, and copy of resolution adopted on that day is hereto annexed (marked Plaintiffs' Exhibit D).

47 Cross-examined:

Q. Did Mr. Mellon claim of you the sum of $5,000 as the price of a license to use his improvement during the whole term of the patent on the defendants' road?

A. He says that was his claim, and I think it very likely that he is correct.

Q. When and where was that claim made?

A. As to place, I should say it was at Scranton; as to time, I cannot name the day; but it was during these negotiations of April and May, 1867.

Q. Did you not, after the settlement of April 4, 1867, send for Mr. Mellon to call on you in reference to the future use of his improvement on the defendants' road?

A. Not that I recollect of.

Q. But he did call on you?

A. He did call.

Q. Did you communicate to Mr. Mellon the action of the board after the passage of the resolution of May 31, 1867?

A. My recollection is that I told him that the matter was referred to me with power; I cannot say that I used the words with powers, but presume I did, from the fact that I am in the habit of using that expression when discretionary power is given.

Q. Is that all you told him in reference to the action of the board?

A. I do not now recollect of telling him anything else; yet I would not say that I didn't.

Q. Has anything been paid to Mr. Mellon for or on account of the alleged license (Exhibit I)?

A. Not that I am aware of.

Q. Did the board of directors at any subsequent time reconsider this matter; I mean subsequent to May 31, 1867?

A. Never, to my knowledge; I do not think it was ever brought before the board again.

48 Q. Did you make any money offer to Mr. Mellon in compliance with the resolution of May 31, 1867?

A. The resolution directed no such offer, and I have no recollection that I ever made any; it is possible that I may have made a nominal offer, but I do not recollect it.

Q. Who fixed the amount stated in the resolution?

(Objected to.)

A. I cannot tell.

Q. Are you willing to swear that you did not say at the board meetings that Mr. Mellon claimed the sum of $5,000 as the price of a license to use his improvement on the defendants' road?

A. If, as he says, that was the price he asked, it is very likely I so stated to the board.

Q. Did not Mr. Mellon at first refuse to sign the paper (Exhibit I); and, if so, what reason did he assign for his refusal?

A. I have no recollection of his refusing at all to sign it; certainly, if he had, I could not and did not compel him to.

Q. At whose suggestion was that paper—Exhibit I—drawn and signed?

A. I told Mr. Mellon that unless he gave us a license to use his improvement it should not be applied upon any more of our locomotives; and thereupon, as I have before stated, the paper was drawn and executed with, as before stated, the understanding only that the company were to give him what they thought proper.

Q. Did you state at the board meeting, prior to the passage of the resolution, that Mr. Mellon had placed in your hands an executed license to use his improvements, which the company could accept and

avail themselves of if they thought proper to use the invention, or words to that effect?

A. I have no distinct recollection at this period of time of the
49 language used in bringing this matter to the attention of the board; but I know I used no language inferring the inference that would be drawn from the language used in the question, because that would not have been in accordance with the facts.

Q. How soon after the meeting of the board did you communicate to Mr. Mellon the purport of the resolution?

A. I cannot say; probably very soon, as I presume he called upon me very soon after my return.

J. BRISBIN.

Subscribed and sworn to by the witness, John Brisbin, June 10, 1875, before me, at the city of New York.

[SEAL.] W. EDWARDS, JR.,
Notary Public, N. Y. C. and Co.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I hereby certify that the foregoing is a true and correct copy of the deposition of John Brisbin, as recalled for the defendants in the aforesaid case, and filed on the 21st day of June, 1875.

Witness my hand and the seal of said court, at Williamsport, this 24th day of November, A. D. 1875.

[SEAL.] HEPBURN McCLURE, *Clerk.*

50 Circuit court of the United States in and for the western district of Pennsylvania.

EDWARD MELLON AND WILLIAM MATTHEWS
vs.
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY. } In equity.

The parties to this action hereby stipulate and agree that the deposition of Watts Cooke, of Paterson, N. J., a witness in behalf of defendants herein, may be taken before Thomas H. Rodman, esq, of the city of New York, as commissioner of said city, on the 24th day of November, A. D. 1875, at 12 o'clock noon; that the said witness may be sworn before a notary public, and that his deposition, when so sworn to and certified by the said commissioner, may be read in evidence by either party upon the hearing or trial of this cause, and upon any proceeding taken by either party in the cause. All questions and objections as to the mode of taking, verifying, or certifying the same are hereby waived. All objections to questions as leading or as matters of form are also waived.

Dated at New York, November 24, 1875.

H. T. FENTON,
Of Counsel with Complainant.
ARMSTRONG & LINN,
For Defendant.

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

I, Thomas H. Rodman, named as commissioner in the foregoing stipulation, do hereby certify that on the 24th day of November, 1875, at

12 o'clock noon, Watts Cooke was examined, pursuant to said stipulation, as a witness in behalf of the defendants, and that his deposition, duly sworn to before D. J. Newland, a notary public, is hereunto annexed.

Dated New York, November 26, 1875.

THOMAS H. RODMAN,
Commissioner.

51 Circuit court of the United States in and for the western district of Pennsylvania. In equity.

EDWARD MELLON AND WILLIAM MATTHEWS
vs.
THE DELAWARE, LACKAWANNA AND WESTERN Railroad Company.

WATTS COOKE, of Paterson, N. J., being sworn and examined as a witness for the above defendants, pursuant to the foregoing stipulation, deposes and says:

Q. Were you at any time in the employ of the Delaware, Lackawanna and Western Railroad Company, the defendants in this case; and, if so, in what capacity, and when did your employment commence and when did it end?

A. I went into the employ of the company in August, 1854, in the capacity of master mechanic; I cannot fix the date with certainty when I ceased to be master mechanic, but I should say it was in 1862 or 1863; I was then appointed superintendent of the defendants' road, and continued as such until the latter part of 1865 or the first part of 1866; I then took the position of superintendent of rolling stock, and continued as such until October or November, 1867; I then left the defendants' employment.

Q. Was Edward Mellon, one of the plaintiffs in this case, in the service of the company during any portion of the period that you have mentioned; and, if so, what portion and in what capacity?

(Objected to by plaintiffs' counsel.)

A. In the depression in 1857 Mr. Mellon came to work for the company; he stayed there until, I should think, the fore part of 1867;
52 I can't say positively; it was some little time before I left their employ; he was there in the capacity of a machinist; he was employed by the day, or so understood; he had the tire and driving-wheel work during most of the period, at a fixed price per wheel.

Q. Did he, during the time that he was in the service of the company, get up or invent the improvement in this case for the fastening of tires upon locomotive wheels?

(Objected to by plaintiffs' counsel on the grounds—

1. That the witness could only testify from hearsay as to any invention or discovery made by Mellon.

2. That it does not appear as yet that the witness has any knowledge whatever of Mellon's invention or of his letters patent.

3. It does not yet appear that he was connected with the same department as Mr. Mellon in the service of the company.)

A. He made such improvement while he was connected with the company.

(Plaintiffs' counsel now withdrew his objections to the foregoing question.)

The witness says: I may be mistaken as to the date given above

where Mr. Mellon came into the employ of the company; it may have been before 1867.

Q. Was Mr. Mellon, during the period that he was in the service of the company, engaged in the department over which you had control?

A. Yes; during the whole period.

Q. Were you, during the progress of the making of this improvement or invention, acquainted and familiar with the progress being made therein; and did you or not frequently confer with Mr. Mellon in reference thereto?

(Objected to by plaintiffs' counsel.)

A. I was acquainted and familiar with the progress being made in the said improvement or invention as the same progressed; and my conferences with Mr. Mellon in reference thereto were very frequent.

53 Q. Was the improvement, with your consent, applied upon the company's locomotives before letters patent were obtained by Mellon?

(Objected to by plaintiffs' counsel.)

A. I permitted him to experiment with the understanding that no claim would be made in case the patent was obtained.

Q. State whether about the time that Mr. Mellon left the service of the company he made a claim for the use that had been made by the company of his improvement.

(Objected to by plaintiffs' counsel.)

A. I cannot answer that question except by saying that perhaps a year and a half prior to my leaving the company he claimed that it would be only just and fair that the company should reimburse him the expenses he had been at in obtaining the patent.

Q. Do you or not recollect that the company paid Mr. Mellon for the use they had made of his improvement up to a certain time?

A. I recollect there was a settlement made up to a certain date.

Q. At the time of that settlement who was president of the company?

A. John Brisbin.

Q. Did you receive any orders from him, as president, after the settlement to which you have referred was made, as to the further use of the improvement; and, if so, what were they?

(Objected to by plaintiffs' counsel.)

A. I received notice from Mr. Brisbin, the president of the company, to permit no more tire to be used or put on in that way with Mellon's patent.

Q. Did you inform Mr. Mellon that you had received that notice, and what it was?

A. I informed Mr. Mellon that I had received official notice from Mr. Brisbin to use no more tire put on under his patent.

54 Q. State whether Mr. Mellon, immediately and from time to time after you told him you had received such notice, urged you to intercede with Mr. Brisbin to have the use of his improvement continued; and, if so, what reasons did he give for wishing to have its use continued?

A. He did desire me to intercede with Mr. Brisbin to have his patent used, giving as a reason that if it was discontinued it would injure him with his negotiations with other companies, and that if the company defendant continued to use it it would give some validity to his patent.

Q. Did Mr. Brisbin afterwards inform you that Mr. Mellon had

granted the company the right to use his invention, and direct you to continue the use of it?

(Objected to by plaintiffs' counsel.)

A. Mr. Brisbin did inform me, and showed me the agreement, and told me that we were permitted to use it.

Q. Did Mr. Mellon state to you about that time that he had granted to the company the right to use the invention; and, if so, what considerations did he name as moving him thereto?

(Objected to by plaintiffs' counsel.)

A. I could not say that Mr. Mellon notified me that he had sold the right to the company, but he did tell me that he had settled with the company for the right to use his patent tire-fastening on all the engines they then had or might thereafter have. He said that he considered it necessary to settle with the company as he was situated with the Lehigh Valley Company; that if it was not used by the defendants it might injure his case with the Lehigh Valley. I don't know whether the suit against the Lehigh Valley had then been brought or not. He said he hoped to get an act of the legislature of the State of Pennsylvania passed making it obligatory on all railroads in the State to use his patent, and it would help him in that—the fact that he had settled with the defendants.

55 Q. State whether, immediately after this settlement, Mr. Mellon frequently saw and talked with you about this patent, and whether he then knew and understood that you were continuing the use of his patent; and, if so, did he make any pretence of having any claim against the company for such further use? I refer to the period soon after the settlement of which you have spoken.

A. He did talk with me frequently after this settlement was made. He did know and understand we were continuing the use of his patent. He did not, while I was in the employ of the company defendant, make any pretence that he had any claim against them for such continued use.

Cross-examined by Mr. FENTON:

Q. Did you leave the employ of the defendant company prior to or after Mr. Mellon's connection with it ceased?

A. After.

Q. Do you not know that Mr. Mellon refused to continue in its service unless the defendants continued to use his improvement and pay him for it? I refer now to the time immediately after the payment made to him by the company for those they had used already, and at the time you received the notice from Mr. Brisbin to discontinue the use of the improvement.

A. I don't know anything of the kind.

Q. Did not Mr. Mellon discontinue his connection with the defendants for the reason that they at that time refused to continue the use of his improvement and pay him for it?

A. Not as I understood his reasons for leaving. Their using or not using his improvement had nothing to do with his leaving, as I understood it.

Q. Do you not know that negotiations were pending for a long while between Mr. Mellon and the defendants with reference to the
56 continued use by the company of the plaintiffs' improvement? I mean after that payment was made.

A. I was knowing to all the facts and every move that was made by Mr. Mellon, as he made me his confidant. At least that was the position I thought I occupied, and I knew that he expected to obtain some money from the company. I knew that negotiations were pending be-

tween him and the company, and I should say they were still pending when I left the employ of the company.

Q. Is it not true, then, that the use of the improvement was continued by the defendants with the expectation, on the part of Mr. Mellon, that the negotiations then pending between them would finally result in a grant to the company to continue its use during the term of the patent?

A. I did not so understand it. I understand the question.

Q. What, then, was your understanding of it?

A. My understanding was that under the settlement made the company had a right to use it, and it was optional with them whether any further moneys were paid.

Q. From whom did you derive that information, and when?

A. From Mr. Brisbin and from Mr. Mellon, at or about the time the settlement was made.

Q. What did Mr. Mellon say to you at that time to enable you to arrive at such a conclusion or understanding?

A. Previous to the settlement Mr. Mellon told me that he could not afford to have the company discontinue the use of it. After the settlement was made he expressed himself satisfied, but believed—and I was of the same opinion—that the company would pay him a further sum.

Q. Do you recollect whether that further sum was named?

A. It was named, but I can't state it definitely. I should say it was between three and five thousand dollars.

57 Q. Do you recollect any facts connected with the drawing or execution of the paper—the license or agreement between the company and Mr. Mellon—as to the future use of the patent by the company?

A. I do.

Q. Do you remember Mr. Mellon having stated to you the circumstances connected with the execution of that paper, and asking your opinion whether it would be safe and proper for him to sign it?

A. I do not. I reside now in Paterson, N. J.

WATTS CCOKE.

Subscribed and sworn to this 24th day of November, 1875, before me.

[SEAL.] D. J. NEWLAND,
Notary Public, N. Y. C. and Co.

58 PLAINTIFFS' EXHIBIT A.—MACHINE SHOP.

The Delaware, Lackawanna and Western R. R. Co., to Edward Mellon, Dr.

1867. April 3d. For all claims and demands of every kind to this date for use and infringement of patent dated second October, 1866, for improved mode of attaching tires to wheels of locomotives, including right to use same until tires that it is applied to are worn out..... $246 00

Approved, two hundred and forty-six dollars.

WATTS COOKE,
Sup't of Railroad.

J. BRISBIN, *President.*

[Rev. stamp cancelled. F. F. C.]

Dated SCRANTON, *April* 4, 1867.

Received of The Delaware, Lackawanna and Western R. R. Co. the sum of two hundred and forty-six dollars ($246.00) in full for the above account and of all other claims to date. Signed in duplicate.

EDWARD MELLON.

Examined by me and found correct.

H. F. WARREN, *Clerk.*

I, Thomas H. Rodman, commissioner, do hereby certify that I have compared the foregoing paper with the original paper produced on demand by the defendants, and put in evidence by the plaintiffs, in the action in which the foregoing depositions are entitled, and which in the proceedings before me therein was marked and designated as "Plaintiffs' Exhibit A;" and that the same is a true and correct copy of the said original paper or exhibit, and of the whole thereof, and that the parts thereof written in blue ink indicate and show the parts of said original.

THOMAS H. RODMAN,
Commissioner.

NEW YORK, *June* 15, 1875.

59 Plaintiffs' Exhibit B and C are the letters patent to Edward Mellon named in the bill, and the assignment of one-half interest therein to Wm. Matthews.

PLAINTIFFS' EXHIBIT D.

"The board of managers held a stated meeting at the office of the company, No. 26 Exchange Place, New York, on Friday, May 31, 1867.

* * * * * * *

"The president was authorized to pay Edward Mellon, for the right to use his improvement for fastening the tires upon locomotive driving-wheels, such sum as he might think proper, not exceeding one thousand dollars ($1,000)."

I, Thomas A. Rodman, commissioner, do hereby certify that I have carefully compared the above with the original entry in the record of minutes of proceedings of the Delaware, Lackawanna and Western Railroad Company, of date of May 31, 1867, and that the same is a true and correct copy of the said original entry, and of the whole thereof, and that the said copy is "Plaintiffs' Exhibit D," referred to in the foregoing record of proceedings before me in the action in which the same is entitled.

THOMAS H. RODMAN,
Commissioner.

NEW YORK, *June* 10, 1875.

60 UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

I, B. S. Bentley, jr., clerk of the circuit court of the United States for the western district of Pennsylvania, at Williamsport, do hereby certify that the foregoing is a true and correct copy of the whole record and proceedings in No. 18, June T., 1875, wherein Edward Mellon and William Matthews are complainants, and The Delaware, Lackawanna and Western R. R. Company are defendants, so full and entire as the same remains of record in my office, except Plaintiffs' Exhibits B & C.

Witness my hand and the seal of said court, at Williamsport, this 12th day of February, A. D. 1879.

[SEAL.] B. S. BENTLEY, JR., *Clerk.*

(Indorsement on cover:) No. 244. Edward Mellon and William Matthews, appellants, vs. The Delaware, Lackawana & Western Railroad Company. W. Pennsylvania C. C. U. S. Filed 15th September, 1879.



Supreme Court of the United States.

No. 244, October Term, 1881.

Edward Mellon and William Matthews,
APPELLANTS,

vs.

The Delaware, Lackawanna & Western Railroad Company,
APPELLEES.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

BRIEF FOR APPELLANTS.

HECTOR T. FENTON,
FURMAN SHEPPARD,
Counsel for Appellants.

REPUBLICAN PRINT, SCRANTON, PA.



Supreme Court of the United States.

EDWARD MELLON and WILLIAM MATTHEWS, *Appellants*,
vs.
THE DELAWARE, LACKAWANNA & WESTERN R. R. Co., *Appellees*.

No. 224, October Term, 1881.

STATEMENT OF THE CASE.

This is an appeal from a decree in equity of the Circuit Court of the United States, for the Western District of Pennsylvania, by Edward Mellon and William Matthews, who filed their bill of complaint against the appellees as Respondents below, charging the latter with infringement of letters patent of the United States, granted to Edward Mellon and assigned to the appellants, dated October 2d, 1866, for an improvement in mode of attaching tires to wheels of locomotives. The device used by the appellees was the specific device described and claimed in the claim of the patent, viz.: A wheel with a curved flange on its inner edge, in combination with a tire with a rounded corner to fit said curved flange.

The appellees filed a plea to the bill, setting up that a license had been granted to them by the patentee, Mellon, and made profert of the paper alleged to be such license, dated May 15, 1867. Issue was joined upon

the plea, and proofs were taken upon both sides; the respective allegations of the parties in substance being, on the part of Mellon, that negotiations were pending between them for a license, and that at the request and instance of the President of appellees, he signed the paper now set up as a license and delivered it in escrow to the President, in order that the latter should present it at the next meeting of the Board of Directors, and if the terms, to wit: a payment of $3,500, were accepted by the appellees, the paper was to be valid as a delivered instrument and then take effect as such. The appellees contended that Mellon, desiring that they should use the invention on their road as an introduction of it, presented them with the license, and left it to the generosity of the directors of the appellees if the latter should pay him anything for it. They did subsequently authorize the President, in his discretion, to pay to the appellant, Mellon, for the right to use the patented device, a sum not exceeding $1,000. The President never made any such offer to the said appellant, in accordance with the meaning and spirit of the resolution, kept the paper, treating it as a license, and never paid the appellant anything for it, whereupon this bill was filed.

ASSIGNMENTS OF ERROR.

1. The learned Court below erred in sustaining the plea of the appellees, defendants below, and dismissing appellant's bill.

2. The learned Court below erred in finding, by its order sustaining the plea, that the delivery of the alleged license was an absolute delivery, and not a conditional one.

3. The Court below erred in sustaining the plea of the defendants below, because the weight of the evidence was in favor of the proposition that the alleged license was in effect a mere submission of terms in writing, and not to take effect as a license unless such terms were accepted and complied with.

ARGUMENT FOR APPELLANTS.

Undoubtedly the paper writing set up by the special plea purports to be a valid, executed instrument, and a full answer to the relief prayed for in the bill; it is also true that the possession of it by the license imports a delivery. Yet it is equally true that the presumption of delivery may be rebutted, and the fact of execution explained, even so far as to show that the paper, though in form a license, never was intended to have effect as such, or that it was delivered in escrow to become valid in law upon the performance of certain conditions, without which it would have no vitality.

The question presented by this record is purely one of fact, and it is earnestly contended that the Court below erred in its conclusion. The appellees' averment of a perfect execution and delivery of the instrument was not supported or proven, outside of the presumptions arising from the paper itself, except by the testimony of a single witness, John Brisbin, and he an officer of the defendants' corporation; and the person who, as President of the company at that time, was instrumental in procuring the appellant to execute the paper. Certain facts are admitted on both sides. 1st. That the paper was actually signed by Mr. Mellon. 2d. That the appellees desired a license. 3d. That the price asked for it was not less than $3,500.

4th. That the appellees were willing to pay a price not exceeding $1,000 for it, and 5th. That no money was ever paid for it.

The appellees' version of the affair is that Mellon, having been engaged with their company at the time of making the invention, naturally desired that the company should be the first to recognize the value of the invention and patent, by using the former on the road and taking a license under the latter; that he voluntarily, and without other consideration than as stated, made and delivered the license in question, leaving it to the generosity of the company whether it should make any payment to him therefor or not. Another witness, Watts Cooke, was called to corroborate John Brisbin in this view of the transaction, but his testimony failed to support the theory. His statements, in direct examination, were so far qualified by his answers on cross-examination, as to show that long after the paper had been executed, and the Board of Managers of appellees' company had authorized the payment of a sum not exceeding $1,000 for the right to use the invention, that negotiations were pending between Mellon and the company respecting the matter at issue, and that the appellant thought his price of $3,500 should be accepted as the proper value of the right offered to be conferred.

As against the appellees' theory, the appellant, Mellon, presents a perfectly connected story, bearing upon its face all the evidences of truth, supported by the circumstances surrounding the transaction, and corroborated by the documentary and other evidence in the cause.

It plainly appears that after the invention had been made, the patent issued and Mellon had left the service of the company, the latter made a settlement with

him for all royalties for tires and wheels applied to the appellees' engines to that date—April 3, 1867—as appears from the receipt. Plaintiff's Exhibit A in evidence. (See page 27 of record, folio 58.) This transaction was followed, as Mellon testifies, by concessions and negotiations between him and John Brisbin, President of the company, relative to the future use of the invention by the company, and the terms upon which the latter would be permitted to use it.

Mellon states that he offered the company a license for five thousand dollars, finally agreeing to accept thirty-five hundred, and that Brisbin, disclaiming any authority to make a contract of that character, promised to bring the matter before the Board of Managers, but refused to do so unless Mellon would sign a license in due form, which Brisbin then prepared and Mellon executed. The former testified that it was signed voluntarily, and to take effect immediately as a license and without conditions affecting its validity as such, Mellon trusting to Brisbin to bring the matter before the Board, and so present it that the latter would, though without legal liability so to do, authorize a payment to Mr. Mellon therefor of the amount he asked for it. On the other hand, Mr. Mellon testified that Brisbin insisted on execution of a formal license before he would present the subject to the directors; that when signing it he (Mellon) declared it to be simply a submission of terms, and, though in form a license, to be considered and take effect as such only in the event of the company accepting his proposition, and paying thirty-five hundred dollars therefor.

Following the execution of the paper on May 15, 1867, the Board of Directors, on the 31st of May, 1867, considered the subject, and passed the resolution of that date. (See Exhibit D, page 28 of record, folio

59.) These two papers, exhibits A and D, together with the testimony of Watts Cooke, constitute the only extrinsic evidence in the cause by which to judge between the statement of Brisbin and that of Mellon. The intrinsic evidence in the cause is the utter improbability of Mr. Brisbin's version of the transaction. The company had a few weeks previously, (April 3, '67), recognized the validity of the patent, and its liability by payment to Mellon for all tires made and applied to its engines up to that date. Why, then, should Mellon voluntarily give to it a valuable license, worth several thousand dollars, without any consideration whatever? It is highly improbable that he would give such a paper, trusting alone to their sense of justice to pay him its value, when, as appears from the testimony on both sides, the settlement of April 3, 1867, was only made after the company had denied the right of Mellon to compensation, and also that the officers of the company had declined to order the discontinuance of the use of the improvement.

The language of the resolution of May 31st is inconsistent with Brisbin's story, and entirely accords with Mellon's. It is a counter offer of $1,000; it is an authority to the President to use his discretion in the matter, to purchase, if he saw proper, at not exceeding that sum, "the right to use" the patented improvement.

That this was not a gift or gratuity, is plain from its terms, and from the subsequent action of Brisbin in offering Mellon $250 for his license, and finally paying him nothing; and from the testimony of Watts Cooke, the Superintendent, who, although he was called by the appellees, and testified generally in their favor, admitted that the amount in question for the license was between three and five thousand dollars, and that

"negotiations were pending between him and the company, and I should say they were still pending when I left the employ of the company." (See page 27, folio 56.) He left the employ of the company in October or November, 1867. (Page 24, folio 51.) The license is dated May 15, 1867, and the resolution of the Board of Managers was made May 31, 1867. If the license was a *gift* to the company, there was no reason for "negotiations" to be continued for a period of five or six months afterwards.

The weight of the evidence is clearly with the appellants, and the order sustaining the plea should be reversed.

HECTOR T. FENTON,
FURMAN SHEPPARD,
Counsel for Appellants.

January 16, 1882.

14-120

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~99.~~ 55

THE CITY OF CHICAGO, APPELLANT,

vs.

WILLIAM C. TEBBETTS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 19, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 299.

THE CITY OF CHICAGO, APPELLANT,

vs.

WILLIAM C. TEBBETTS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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State of Massachusetts, brings this his bill against the city of Chicago, a corporation subsisting under the laws of the State of Illinois, and located in Cook County, in the State of Illinois, and Levi D. Boone of Chicago, Illinois, and a citizen of the State of Illinois, and Charles A. Gregory, of Chicago, Illinois, and a citizen of the State of Illinois, the Union Mutual Life Insurance Company of Maine, a corporation subsisting under the laws of Maine, and having an office and agents and doing business in said city of Chicago, and James D. Bruner, of Saint Louis, Missouri, and a citizen of Missouri, defendants.

Your orator respectfully represents that he ought to have of and from the said city of Chicago the sum of ten thousand dollars, and interest on the same from, to wit, the 14th day of May, 1869, till
4 the time the same shall be paid, which the said city equitably owes to your orator, and your orator founds his claim to the same on the following facts:

Your orator states that on or about the 28th day of December, 1865, one Elisha S. Wadsworth & Charlotte, his wife, sold & conveyed the premises hereinafter described unto said James D. Bruner, by warranty deed of that date, duly acknowledged, delivered, and recorded, and that the said deed was filed for record on the 16th day of January, 1866, and recorded in book 333 of deeds, page 74; and that afterwards the said James D. Bruner, being in the actual possession of said premises, and the owner thereof, made, executed, and delivered unto said Levi D. Boone, as trustee, two certain trust deeds on said premises, one dated July 10, 1866, and duly recorded July 25, 1866, in book 333 of deeds at page 603, in the recorder's office of said Cook County, and given to secure a promissory note of ten thousand dollars and interest thereon at the rate of eight per cent. per annum, payable semi annually, payable in one year from its date unto the Union Mutual Life Insurance Company of Maine, being for money loaned by said company to said Bruner, said note being made by said Bruner and one of said trust deeds dated on or about the 12th day of June, 1867, & duly recorded on the
5 14th day of June, 1867, in book 388 of deeds, at page 474, in said recorder's office, given to secure a promissory note of eight thousand dollars and interest thereon at the rate therein mentioned, payable at two (2) years after its date unto the said Union Mutual Life Insurance Company, for money loaned to said Bruner by said company, said note being made by said Bruner, on which last mentioned note afterwards, on the 12th day of December, 1867, two thousand dollars and the interest thereon to that time was paid, leaving six thousand dollars as the remainder owing on said note; in said trust deeds the wife of said Bruner joined; that on or about the 9th day of September, 1867, said Bruner sold and conveyed said premises by warranty deed unto said Charles A. Gregory by deed of said last mentioned date, the said Bruner being then a single man and a widower, and said deed was on the 10th day of September, 1867, duly recorded in book 409 of deeds, at page 482, and the said premises were so sold to said Gregory subject to said two trust deeds.

Your orator further states that on the 25th day of May, 1868, and until the time of the appropriation thereof by the said city of Chicago for street purposes, as hereinafter mentioned, said Gregory was the owner in fee of the east thirty-six feet of the west forty feet of lot one,
6 in block one hundred and forty-one, school section addition to Chicago, in the city of Chicago, in Cook County, Illinois, being the same premises above referred to.

That at the same time said premises were subject to the two certain

trust deeds before mentioned, and were not otherwise in any way incumbered; that said land was occupied by several frame buildings; that said Gregory was during all the time from the said 24th day of May, 1868, till the said city of Chicago took possession of said premises, in possession of said premises by his tenants occupying said land & buildings; that the said city of Chicago wanted said premises for a street, and on the 25th day of May, 1868, the common council of said city passed an order for the extension or opening of Dearborn street in said city, from its then southern terminus to the north line of Jackson street, of the width of eighty feet, the dividing line between blocks 120 and 141 and between blocks 121 and 140 of school-section addition to Chicago, to be the centre of said street as extended or opened; and said premises lay wholly within the limits of such proposed extension; and thereupon the commissioners of the board of public works of said city proceeded to and did ascertain and assess the damages and recompense due the owners of such land respectively,

7 and at the same time determine what real estate would be benefited by such improvement, and assess the damages, together with the costs of proceedings, on the real estate by them deemed benefited in proportion, as nearly as might be, to the benefit resulting to each separate lot or parcel; and before proceeding to make such assessment said commissioners were, on the 26th day of June, 1868, duly sworn according to law faithfully to execute their duties according to the best of their ability; and before proceeding to make such assessment the said commissioners gave six days' notice, dated and commencing on or about the 18th day of August, 1868, by publication, in the then corporation newspaper of said city, of the time and place of their meeting for the purpose of making said assessment, said notice being as required by law; and having otherwise in all respects proceeded according to law in the premises, said commissioners did, on or about the 26th day of August, 1868, make the proposed assessment, and did then and there determine and appraise in writing to the owner or owners the value of the real estate appropriated for the said improvement and the injury arising to them respectively from the condemnation thereof to be awarded to such owners respectively, as damages, after

8 making due allowance therefrom for any benefit which such owners might respectively derive from such improvement; and said commissioners did complete their said assessment on or about the 26th day of August, 1868, and did thereupon sign the assessment roll thereof, and did, on or about the 29th day of August, 1868, file said assessment roll in the office of the city clerk of said city, and did also file a duplicate thereof in the office of the said board of public works.

That the said commissioners did in all respects comply with the law and charter and ordinances of said city in regard to said assessment and the opening of said street, and did describe the real estate upon which their assessments were made; that said commissioners did, by notice commencing on the 31st day of August, 1868, give six days' notice by publication in the then corporation newspaper of said city, of the filing of such assessment roll in the office of the clerk of said city, and that at the next regular meeting of the common council of said city, to be held after the expiration of such publication, to wit, on the 7th day of September, 1868, they, said commissioners, would apply to the said common council for a confirmation of said assessment; and afterwards

9 the said commissioners, having so applied for said confirmation according to law, the said common council, after due adjournment according to law, did, to wit, on the 5th day of October, 1868,

confirm the said assessment in manner required by law; and said assessment having been duly confirmed and never set aside or annulled, and no appeal therefrom having been prosecuted, but all proceedings for appeal therefrom having been withdrawn and dismissed, on the 24th day of October, 1868, the said confirmation became then and there a lawful and sufficient condemnation of the land ordered to be appropriated thereby.

And in and by said assessment and confirmation and condemnation there was condemned the real estate first above mentioned, then and there the property of the said Gregory, subject to the said two trust deeds only, which property lay wholly in the street so opened, or to be opened, so that no benefit was charged thereon, and then and there by said proceedings the said commissioners awarded to the said Gregory, as the owner of said premises, the net sum of thirty-six thousand ($36,000) dollars for the said property so condemned as aforesaid as damages as aforesaid.

And thereupon, to wit, immediately after the 24th day of October, 1868, it became and was the duty of the said city of Chicago to
10 proceed immediately, and with diligence, to collect money by the means provided by law sufficient to pay the aforesaid assessment and award as aforesaid assessed, and awarded to the said Gregory, and confirmed as aforesaid, and to pay the same to the person and persons entitled thereto within a reasonable time; and the said city of Chicago then and there faithfully promised the said owner and owners of said premises to faithfully and diligently perform their said duty in all respects in this behalf; the said Gregory was then and there in the actual occupancy of said premises as the owner thereof, subject to the said incumbrances as aforesaid, and that then and there afterwards, to wit, on the 14th day of May, 1869, and until the said city of Chicago took actual possession of said land, to wit, on or about the time last mentioned, said Gregory claimed said land and the said award of money therefor, and did, to wit, in or about & some time before the said 14th day of May, 1869, furnish and deliver to the said city of Chicago a sufficient abstract of title of said land, showing himself entitled to such damages, subject to the incumbrances aforesaid; which abstract was then and there acceptable to said city of Chicago, and all the
11 time above mentioned the said city of Chicago had actual notice and knowledge of all the premises.

And thereupon said city of Chicago, by its agents, the said board of public works, with knowledge & notice of all the premises, delivered to said Gregory a voucher for said sum of thirty-six thousand dollars, thereby acknowledging in writing the said Gregory as entitled to said damages; and then and there the said city of Chicago paid as part payment of said damages to the said Gregory the sum of twenty thousand ($20,000) dollars; a copy of which said voucher is hereunto annexed and made part of this bill, marked Exhibit A; and said Gregory then and there assigned in writing and delivered said voucher to said Boone as trustee and as agent for the said insurance company, and afterwards, to wit, on the 5th day of June, 1869, the said city of Chicago paid to said Boone, as trustee and as agent for said insurance company, six thousand ($6,000) dollars on account of said voucher, and the said city, by its comptroller, endorsed the payment thereof on said voucher, and said Boone, as trustee and as agent for said insurance company, applied said sum of six thousand dollars on the payment of said note & trust deed of June 12, 1867, aforesaid in payment thereof; and since said 5th day of June, 1869, said city of Chicago has failed & neglected to
12 pay any further sum on account of said voucher or on account of

said damages and award, although often, actually & specially, in fact, requested to pay the same, to wit, the remainder of said sum so awarded as aforesaid; and your orator says, no doubt on the part of said city, or of any of said parties, has ever arisen as to whom said money ought to be paid to, & no one has ever claimed the same except as herein in this bill set forth.

Your orator further says that on or about the twenty-first day of May, eighteen hundred and sixty-nine, the said board of public works gave ten days' notice, by publication in the then corporation newspaper, that the money was collected and ready in the hands of the treasurer of said city to be paid over to the parties entitled to said damages for property condemned under and by said assessment and condemnation aforesaid; and that during all of said time said Boone was, and was known to be by said city of Chicago, the agent of the said Union Mutual Life Insurance Company at Chicago aforesaid; and said Boone, as such agent, while holding the said trust deeds and notes, as aforesaid, and said voucher, often requested and importuned said city to pay said money so due as aforesaid, but said city neglected to pay the same;

13 that said Boone afterwards foreclosed said trust deed of July 10, 1866, and assigned to said complainant, your orator, the said voucher, as hereinafter mentioned; and that your orator, while, equitably or legally, as the case may be, the owner of said premises, and the owner & holder of said voucher, often requested said city of Chicago to pay the remainder of said sum mentioned in said voucher, but said city of Chicago has hitherto neglected & still neglects to pay the same, and the said voucher is now in the hands of your orator ready to be produced and given up to said city of Chicago whenever payment shall be made thereof.

And your orator states that in and by said trust deed of the 10th of July, 1866, above mentioned, it was expressly provided that in case of default in payment of said promissory note and interest therein mentioned, or either or any part thereof, then on the application of the holder of said note it should be lawful for said Boone to sell and dispose of said premises at public auction, at the north door of the court house, in the city of Chicago, in the State of Illinois, for the highest and best price the same would bring in cash, twenty days' notice of such sale having been first given in one of the newspapers published in said city of Chicago, and to make and deliver to the purchaser at such sale good and sufficient deed of conveyance for the premises sold, &c.

14 Your orator states that default was made in the payment of said note and of its interest, and that on the application of the said Union Mutual Life Insurance Company, the then holders of said note, said Boone advertised & sold said premises in accordance with the power and directions of said trust deed, and that the said Union Mutual Life Insurance Company, on the day of such sale, to wit, on the 16th day of August, 1872, bought said premises at such sale, and the said Boone, trustee as aforsaid, made, executed, and delivered a deed of the same to the said insurance company, dated August 16, 1872, and the same was filed for record September 5, 1872, and recorded in book 149 of records, page 423, and said company bid for said premises the amount of money due on said note, and the costs and expenses of said sale, &c; and afterwards the said insurance company sold and conveyed, or purported to sell and convey, said premises unto your orator, and made, executed, and delivered its deed therefor unto your orator of date of December 27, 1872, which deed was duly recorded June 13, 1876, in

volume 643 of records, on page 182, and at the same time your orator paid the said insurance company the sum of upwards of ten thou-
15 sand dollars in money in cash, being the amount of all the money due on said note for principal and interest, and all costs and expenses of sale under said trust deed, &c, and, therefor, with the delivery of said deed to your orator, said Boone, as trustee and as agent for said insurance company, delivered over to your orator, endorsed and assigned in blank, without recourse, the said voucher above mentioned, on which there then appeared to be due, and was due, ten thousand dollars and such interest as by law had accrued on the same.

(See amendment on page 33 of this transcript.)

Your orator insists that either he is to be treated as the equitable assignee of said note for ten thousand dollars, and the said trust deed security on said premises therefor and of said voucher, and so entitled to have and receive from the said city of Chicago said sum of ten thousand dollars and all damages & interest for its detention, or else he is to be treated as the owner of said land, subject only to the right of the said city of Chicago, to have and hold the same under said condemnation proceedings upon payment therefor to your orator, as by law was at the time of such proceedings provided, together with damages in the nature of interest for the wrongful detention of such money.

16 Your orator further states that neither, he nor the said Boone nor the said Union Mutual Life Insurance Company has or have been guilty of any delay in the attempt to collect said money from said city of Chicago, but have urgently demanded said money many times of said city of Chicago; also that on or about the day of , in or about 1873, your orator, failing to get any satisfaction from said city, brought a suit in ejectment on said premises against said city, in the superior court of Cook County, which was afterwards brought to trial before the court, the jury being waived, and on the trial thereof in 1876 decision was given for the said city of Chicago, on the ground, as stated by the judge who tried said suit, that it was not proven on the part of the plaintiff in that suit that the said Union Mutual Life Insurance Company was authorized to take the title to said premises & to lawfully convey the same to your orator, the said insurance company being a foreign corporation. Your orator then dismissed said suit before judgment, and thereupon your orator, in 1876, brough suit in ejectment on said premises against said city of Chicago, in the circuit court of the United States in the northern district of Illinois; and
17 the same being tried before the court, a jury being waived, the court decided that the plaintiff therein was not entitled to recover in ejectment, for that the acceptance of the said voucher & the receipt of money thereon was an affirmance of the validity of the said condemnation proceedings, & the city having taken possession of said land the plaintiff was estopped to question the right of the city to the same, therefore & thereupon the plaintiff dismissed his suit before final judgment; & the court then said in rendering its decision therein that the plaintiff ought to have his money for said premises, and the counsel and attorney for said city in open court stated that the city was ready and willing to pay said money to whomever was entitled to the same; and your orator says that said city of Chicago has failed and has neglected for an unreasonable length of time to collect said money, and has also failed and neglected for an unreasonable length of time to pay over said money, and vexatiously and unreasonably has withheld the same.

And your orator states that several times during the winter of 1876

& 1877, and again on or about the 14th day of June, 1877, your
18 orator requested said City of Chicago to pay said sum of money to which your orator is entitled as aforesaid, but said city has neglected to pay the same or any part thereof hitherto.

And the said Charles A. Gregory, the said James D. Bruner, Levi D. Boone, and the Union Mutual Life Insurance Company, as well as the said City of Chicago, claim to have some interest in the premises.

In tender consideration whereof and forasmuch as your orator cannot have plain and adequate and complete remedy at law, and can only have relief in a court of equity, &c., to the end therefore that the said City of Chicago and the other defendants above mentioned may answer all and singular the premises, the necessity of the answer being under oath of any or either of the said defendants being hereby expressly waived; and that the said City of Chicago may be decreed to pay to your orator the sum of ten thousand dollars and the interest thereon from, to wit, the 14th day of May, 1869, to the time of such payment, and that said trust deed for ten thousand dollars and interest may be decreed to stand as security for your orator; and that your
19 orator may be decreed to be the owner of said premises to the extent of the said lien thereon; and that your orator may have such other and farther or different relief in the premises as the nature of his case shall require and to your honor shall seem meet:

May it please your honor to grant the writ of summons in chancery, directed to the proper officer, commanding him that he summon the defendants, the City of Chicago, Charles A. Gregory, James D. Bruner, Levi D. Boone, the Union Mutual Life Insurance Company of Maine, to appear before said court on the first day of the next August term thereof, to be held at the court-house in said district, & then & there to answer this bill, etc.

By CHARLES A. GREGORY,
Solicitor for Complainant.

20 EXHIBIT A.

(Copy.)

Special assessment voucher.

CHICAGO, *May 14th*, 1869.

Warrant No. 562.

City of Chicago, for the board of public works, to C. A. Gregory, dr.

For amount of damages awarded to E. 36 ft. of W. 40 ft. of lot 1, block 141, school section addition to Chicago, the same having been condemned for the extension or opening of Dearborn street from its present southern terminus to the north line of Jackson st., of the width of 80 feet, the dividing lines between blocks 120 and 141 and between blocks 121 and 140 of school section addition to Chicago to be the centre of said street, as extended or opened, being payment in full for all claims for damages to the same by reason of said proceedings.....	$36,000 00

Less amount paid on acct. March 22, 1869 ..... 20,000 00

Balance due $16,000 00

Comptroller.

Approved by the board.

A. H. BURLEY,
President.

Paid six thousand dollars on acct. of this bill, June 5th, 1869.

W. KIMBALL,
City Comp'r,
Pr. CHASE.

21 Special assessment voucher No. , H. , C. A. Gregory.

Warrant 565 ..... $16,000 00
Paid on ac. June 5, '69 ..... 6,000 00

Comptroller of the city of Chicago pay the within amount to Dr. L. D. Boone, as trustee and general agent of the Union Mutual Life Insurance Company of Maine, in full of principal due said company for lien on within land, without recourse to me.

May 15, '69.

C. A. GREGORY.

Entered.

A. W. TRICKHAM,
Secretary.

Without recourse on me.

L. D. BOONE,
Trustee, &c.

Received payment in full of all demands whatsoever, both in law and equity, against the city, to within date.

(Endorsed :) Filed June 26, '77. Wm. H. Bradley, cl'k.

22 And on the same day, to wit, the 26th day of June, A. D. 1877, a writ of subpœna issued out of said clerk's office to the said defendants in said entitled cause, which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Writ of subpœna.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss :

The United States of America to the City of Chicago, Charles A. Gregory, James D. Bruner, Levi D. Boone, and The Union Mutual Life Insurance Company of Maine, greeting:

We command you and every of you that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of August next, to answer the bill of complaint of William C. Tebbetts, this day filed in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and

decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

23 Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 26th day of June, in the year of our Lord one thousand eight hundred and seventy-seven, and of our Independence the 101st.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Memorandum.

The above-named defendants are notified that unless they and each of them shall enter their appearance in the clerk's office of said court, at Chicago aforesaid, on or before the day to which the above writ is returnable, the complainant's bill will be taken against them as confessed and a decree entered accordingly.

WM. H. BRADLEY, *Clerk.*

I have served the within writ within my district in the following manner, to wit, upon the City of Chicago therein named, on the 26th day of June, A. D. 1877, by delivering a true copy of said writ to Monroe Heath, may or of said city, on that day.

I did not serve the other defendants, by order of plaintiff's attorneys

J. S. HILDRUP,
U. S. Marshal,
By J. STILLWELL,
Deputy.

24 (Endorsed:) Filed June 27, A. D. 1877. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 6th day of August, A. D. 1877, said defendant The City of Chicago, filed in said clerk's office, by its solicitor, its appearance in said entitled cause, which said appearance is in the words and figures following, to wit:

Appearance of The City of Chicago.

In the circuit court of the United States for the northern district of Illinois. In chancery.

WILLIAM C. TEBBETTS
vs.
THE CITY OF CHICAGO ET AL. } Bill.

I hereby enter my appearance as solicitor of record for the defendant The City of Chicago, and authorize the clerk of said court to enter the same of record.

FRANCIS ADAMS,
Solicitor for Defendant City of Chicago.

(Endorsed:) Filed Aug. 6, '77. Wm. H. Bradley, cl'k.

25 Afterwards, to wit, on the 7th day of August, A. D. 1877, said defendants The Union Mutual Life Insurance Company of Maine, Levi D. Boone and James D. Bruner, by their solicitor, filed in said

clerk's office their appearance in said entitled cause, which said appearance is in the words and figures following, to wit:

Appearance of the Union Mutual Life Insurance Company of Maine, Levi D. Boone and James D. Bruner.

In the United States circuit court in and for the northern district of Illinois. August term, 1877. In chancery.

WILLIAM C. TEBBETTS
vs.
UNION MUTUAL LIFE INSURANCE COMPANY of Maine, Levi D. Boone, James D. Bruner, impleaded with The City of Chicago, and Charles A. Gregory.

I hereby enter my appearance in the above cause for three of the defendants, The Union Mutual Life Insurance Company of Maine, James D. Bruner, and Levi D. Boone, and waive service of process.

ROB'T. B. KENDALL,
Solicitor for said three Def'ts.

(Endorsed:) Filed Aug. 7, 1877. Wm. H. Bradley, cl'k.

26 Afterwards, to wit, on the 5th day of September, A. D. 1877, said defendant The City of Chicago, by its solicitor, filed in said clerk's office its answer in said entitled cause, which said answer is in the words and figures following, to wit:

Answer of The City of Chicago.

In the circuit court of the United States, northern district of Illinois. In chancery.

WILLIAM C. TEBBETTS
vs.
CITY OF CHICAGO ET AL.

The answer of The City of Chicago, defendant, to the bill of complaint of William C. Tebbetts, complainant.

This defendant, saving and reserving unto itself all manner of benefit of exception to the many errors and uncertainties in the said bill of complaint contained, and praying the same benefit on the hearing hereof as if it had demurred to the same, for answer thereto, or to so much thereof as this defendant is advised is material or necessary to be answered unto, says:

It admits that, to wit, May 25th, 1868, the common council of the city of Chicago passed an ordinance for the extension of Dearborn street, as alleged in said bill.

27 That under and by virtue of said ordinance, and the statute in such case made and provided, a special assessment was made of the damages and benefits which would accrue to private property by reason of said improvement and excess of damages over benefits, or the contrary, as the case might be.

That it was necessary, for the purpose of the said improvement, to

condemn and appropriate the east 36 feet of the west 40 feet of lot 1 in block 141 in the school-section addition to Chicago.

That in and by the said assessment damages were assessed in respect of said premises at the sum of $36,000, and that afterwards, to wit, October 5th, 1868, the said assessment was confirmed by the common council of the city of Chicago.

And defendant is advised by counsel, and believes and states, that by the confirmation of the said assessment the title to the said premises was divested from and out of the former owner or owners thereof, and was vested absolutely in the city of Chicago, and that the said former owner or owners had thereafter no claim, title, or interest whatsoever in said condemned premises, but only a claim against said city for the amount of damages awarded as aforesaid.

And defendant, further answering, says that in and by the
28 charter of the city of Chicago in force at the time when said city entered upon and took possession of said condemned premises as hereinafter mentioned it was and is provided as follows, to wit:

"As soon as the money is collected and ready in the hands of the treasurer to be paid over to parties entitled to damages for property condemned, two days' notice shall be given by the board of public works in the corporation newspaper; and the city may then, and not before, enter upon, take possession of and appropriate the property condemned."

And defendant, further answering, avers that the said City of Chicago having failed to collect the said special assessment, and not having collected or having in its treasury to the credit of the proper fund the money to pay all of the said damages awarded as aforesaid, the said Union Mutual Life Insurance Company of Maine, to wit, May 13th, 1869, made and entered into a certain agreement with Marcus C. Stearns, Henry H. Honore, Eugene S. Pike, Thomas L. Underwood, Charles H. Ham, William M. Butler, Henry M. Shepard, George A. Bigelow, and Joseph E. De Haven, of the said city of Chicago, in and by which said agreement the said Union Mutual Life Insurance Company of Maine, which then and there was the beneficiary or cestui que trust in said trust-
29 deeds, made to its agent, Levi D. Boone, as averred in said bill, for the consideration that the said persons making the said agreement as aforesaid did, in and by said agreement, agree to pay interest on the amounts evidenced by certain promissory notes secured by said trust-deeds, did agree with the said other parties to said agreement that the said City of Chicago might immediately, and without payment of the said damages, enter and take possession of said condemned premises, and did consent to such entry and taking possession.

And defendant avers that the said agreement was well known to the said Charles A. Gregory, and that he consented thereto, and that if it had not been for the said agreement and the said consent of the Union Mutual Life Insurance Company of Maine, defendant, would not have entered upon or taken possession of said premises until such time as the money was collected and ready in the hands of its treasurer to pay all of said damages, but that, influenced solely by said agreement and said consent, defendant afterwards, to wit, June 1st, 1869, entered and took possession of said premises for the purpose of said improvement, and has ever since continued and now is in said possession.

And defendant further avers that the said Union Mutual Life
30 Insurance Company, by Levi D. Boone, its agent, did, under and by virtue of the said agreement with Marcus C. Stearns and others, collect and receive large sums of money as interest on the de-

ferred payments, evidenced by said promissory notes, and so defendant insists and submits to this honorable court that it has never been, and is not, liable for any interest whatever, or unpaid balance, of said damages awarded as aforesaid.

And defendant, further answering, says that all of the records and papers which were in its custody and control, and from which it would appear what, if any, vouchers were issued for said damages, were consumed by fire heretofore, to wit, October 9th, 1871, and that it has no knowledge of what vouchers, if any, were issued for the said damages.

And defendant denies that the said Charles A. Gregory ever at any time furnished to defendant an abstract of title to said premises satisfactory to defendant, or showing title in said Gregory to said premises, and, on the contrary, avers that neither the said Gregory nor the said complainant ever furnished to defendant any abstract of title showing title in said Gregory or said complainant to said premises.

And defendant does not know and has not been informed, save
31 by complainant's bill of complaint, and cannot state upon information or belief, or otherwise, whether any voucher was ever issued for the amount of said damages, or any part thereof, to the said Gregory or any other person, but is advised by counsel, and believes and submits to this honorable court, that no such voucher was or is authorized by law, and that if such was ever issued it could not, and did not, bind this defendant, and that no assignment of such voucher, if any such were issued, could convey any interest, legal or equitable, on the personal claim for the said damages which accrued to the owner or owners of said condemned premises at the time of the confirmation of said assessment.

And defendant, further answering, denies that the said complainant ever had or has any interest whatever in said claim for damages, or in said damages, and denies that the same, or any part thereof, is due or unpaid, and on the contrary avers that the same and every part thereof has been fully paid and discharged.

All which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and prays to be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained, &c.

32 [SEAL.]

M. HEATH,
Mayor of the City of Chicago.

Attest:

CASPAR BUTZ,
City Clerk.

FRANCIS ADAMS, *Sol'r.*

(Endorsed:) Filed Sept. 5th, 1877. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 17th day of September, A. D. 1877, in the July term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

WILLIAM C. TEBBETTS
vs.
THE CITY OF CHICAGO ET AL. } In chancery.

On motion, leave is given complainant to amend the bill of complaint

herein, and defendants are ruled to answer the same within twenty days after service of notice herein.

And on the same day, to wit, the 17th day of September, A. D. 1877, said complainant, by his solicitors, filed in said clerk's office his amendment to the bill of complaint in said entitled cause, which said amendment is in the words and figures following, to wit:

Amendment to bill of complaint.

33 In the circuit court of the United States, northern district of Illinois. In chancery.

WILLIAM C. TEBBETTS *vs.* CITY OF CHICAGO ET AL. } General. No. 14792.

Amendment to the bill of complaint in this cause, made pursuant to an order of the court entered on the 17th day of September, A. D. 1877.

In the 11 page of the original bill, after the 21st line from the top of said page, & next preceding the paragraph which begins thus: "Your orator insists," &c., insert the following:

Your orator further says that the said note of Bruner for ten thousand dollars was signed and delivered to your orator by said Union Mutual Life Insurance Company in consideration of the payment of said sum of money by your orator to said insurance company, as aforesaid, and that there is due on the same the said principal sum and a large amount of interest, to wit, interest from January 6th, 1869, at the rate aforesaid, no part of which has ever been paid by said Bruner, or any person or persons for said Bruner, and said Bruner refuses to pay any part thereof, alleging and insisting that the foreclosure and sale of said
34 premises by said Boone, trustee, and the subsequent purchase of the same by said Union Mutual Life Insurance Company is a complete discharge of said Bruner of and from all liability on said note; and therefore he insists that said note shall be delivered up to him as cancelled and paid; and said Bruner insists that even though no title to said land passed in law by virtue of said trustee's deed, or by virtue of said deed to your orator, still your orator ought to resort to the city of Chicago to compel payment of said damages so awarded for the land which stood as security for said note, to the exoneration of him, the said Bruner, and your orator is willing and hereby offers to stand forever barred of and from all further claim upon said Bruner upon receiving from the city of Chicago the payment of said damages and such interest & costs as may be due thereon & by virtue of the premises.

And your orator shows that at the time when said city of Chicago entered upon and took possession of said condemned premises in and by the charter of the city of Chicago then in force it was and is provided as follows, to wit: "As soon as the money is collected and ready in the hands of the treasurer to be paid over to parties entitled to
35 damages for property condemned, ten days' notice thereof shall be given by the board of public works in the corporation newspaper, and the city may then, and not before, enter upon, take possession of, and appropriate the property condemned."

And your orator charges that the defendant, the said City of Chicago, sometimes alleges and pretends that having failed to collect the said

special assessment, and not having collected, or having in its treasury to the credit of the proper fund, the money to pay all of the said damages awarded as aforesaid, to wit, between the time of said confirmation and the 13th day of May, 1869, the said Union Mutual Life Insurance Company of Maine, to wit, May 13, 1869, made and entered into a certain agreement with Marcus C. Stearns, Henry H. Honoré, Eugene S. Pike, Thomas L. Underwood, Charles H. Ham, William M. Butler, Henry M. Shepherd, George A. Bigelow, and Joseph E. De Haven, of the city of Chicago, in and by which said agreement it is pretended the said insurance company, for the pretended consideration that the said persons making said agreement did, in and by said agreement, agree to pay interest on the amounts evidenced by said promissory notes of said Bruner, did agree with the said other parties to said agreement that the said
36 city of Chicago might immediately & without payment of said damages enter and take possession of said condemned premises, and did consent to such entry and possession, and pretends that said agreement was well known to said Gregory, & that he consented thereto; and that, influenced solely by said agreement, said city of Chicago took possession of said premises, to wit, June 1, 1869, for the purposes of said improvement. And said city of Chicago further pretends and alleges that said insurance company, by said Boone, its agent, did, under and by virtue of said agreement with said Stearns and others, collect & receive large amounts of money as interest on said notes, and so the said city of Chicago insists that it is not liable for any interest whatever on unpaid balances of said damages awarded as aforesaid.

And now your orator says that it is true that some agreement in writing was made by said parties last aforesaid (though the precise nature thereof your orator is unable to state), but that neither the said Gregory, nor the said Boone as trustee or agent, nor the said insurance company thereby in law or in equity waived any right to have and demand of the city of Chicago the damages as aforesaid, nor did either of them in any way, by any such agreement, or any agreement whatever, exonerate
37 the said city of Chicago from its liability and duty to proceed diligently to collect and to pay over within a reasonable time the balance of said assessment to the party entitled thereto, and damages according to law as interest; and your orator avers that the said Stearns and others named above with him, as parties of one part to said agreement, were interested as abettors or otherwise in the opening of said street, and were desirous of hastening the improvement thereof for their own personal benefit, and that the supposed benefit to them and to their property by the speedy opening of said street was the sole consideration that moved them to the making of such agreement, which they urged and importuned said Boone into assenting to, & some such agreement as was in fact made, whatever the same may have been, and if any sum or sums of money whatever was or were paid by them to said Boone as aforesaid, such payments were voluntary payments on their part, and were made for their own personal benefit, and were not payments by said city of Chicago nor on behalf of said city of Chicago on account of said damages or interest, and were not intended to and did not lessen or remove the liability or duty of the city of Chicago to pay over within a
38 reasonable time, or to proceed diligently to collect and pay over the balance of said condemnation money to the party then or now entitled thereto, and that the only effect of such agreement was to license said city of Chicago to enter on said premises in advance of the actual payment or collection of said assessment without being guilty of a trespass or a breach of the law, and that in no way did said Boone or

said insurance company waive his or its security or rights under said trust deed or deeds or to said damages; and your orator shows that said Gregory, at the time the city paid to him a part of said condemnation money, then & there, at the special instance and request of said city of Chicago, made, executed, & delivered to said city of Chicago a quit-claim deed of his right, title, & interest in said premises, in which said Gregory's wife joined, & such deed was made a condition by the city precedent to their aforesaid payment of the money to him.

And your orator further states that said abstract of title to said land so presented, as stated in the original bill, to which this amendment is filed, showed that said Boone & said Union Mutual Life Insurance Company were then the only party or parties interested in said land
39 or said damages, save as said Bruner was interested in having the same made to pay his said debt; & said abstract was satisfactory then and there to said city of Chicago. And your orator avers that it was expressly understood & agreed by and between your orator and said Boone and said Union Mutual Life Insurance Company that in consideration that your orator would pay to said insurance company said sum of money so paid by him as aforementioned, your orator should have all the rights of them, or either of them, in & to said condemnation money.

And your orator is informed & believes, & so charges the fact to be, that said city of Chicago never has collected said assessment & damages, & had the same ready to pay to the owner of said land, but by its own negligence has failed so to do.

CHARLES A. GREGORY,
Solicitor for Complainant.

(Endorsed:) Filed Sept. 17, 1877. Wm. H. Bradley, cl'k.

40 Afterwards, to wit, on the 5th day of October, A. D. 1877, in the adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

WILLIAM C. TEBBETTS
vs.
THE CITY OF CHICAGO ET AL. } In chancery.

On motion, time is extended twenty days for the defendant, The City of Chicago, to answer the amended bill of complaint herein.

Afterwards, to wit, on the 23d day of October, A. D. 1877, said defendant, The City of Chicago, by its solicitor, filed in said clerk's office its answer to the amended bill of complaint in said entitled cause, which said answer is in the words and figures following, to wit:

Answer to amended bill of complaint.

In the circuit court of the United States, northern district of Illinois.
In chancery.

The answer of The City of Chicago, defendant, to the amended bill of complaint of William C. Tebbetts, complainant, sheweth:

That it has no knowledge, information, or belief as to whether the said Union Mutual Life Insurance Company assigned the said promissory note of said Bruner or any other promissory note to said

41 complainant, or whether there is anything due on said note, or not, or anything whatever in regard to the same.

And defendant admits that there was, as averred in said bill of complaint, a provision in the charter of the city of Chicago as therein set set forth.

And defendant, as to the agreement with Marcus D. Stearns and others mentioned in said bill of complaint, says that the allegations in respect to the same in this defendant's answer, heretofore filed in said cause, are true.

And defendant has no knowledge or information and cannot state whether said Gregory executed a quitclaim deed to this defendant, as averred in said bill, but denies positively that said Gregory or any one else ever produced or offered or exhibited to this defendant an abstract of title showing title to said premises.

And defendant knows nothing whatever and has no information in regard to any agreement whatever between the complainant and said Boone and said insurance company or either of them.

And defendant is informed by counsel and believes that the owner in fee of the said premises at the time of the confirmation of the said assessment was and is the party entitled to the said damages or compensation awarded for the same; that the claim of said owner was

42 and is a personal claim, and that no assignment of any promissory note, and no assignment whatever save and except an assignment of said claim for damages by the person owning said premises at the time of said confirmation, would or could operate to give any equitable right or claim to said damages to the assignee.

And this defendant denies that any other matter, cause, or thing in said bill of complaint contained, and not herein and hereby well and sufficiently answered, confessed and avoided, traversed and denied, is true; to the knowledge or belief of this defendant.

All which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly prays, etc., as in its answer to said original bill of complaint it has already prayed.

[SEAL.] M. HEATH,
Mayor of the City of Chicago.

Attest:

CASPAR BUTZ,
City Clerk.

(Endorsed:) Filed Oct. 23d, 1877. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 8th day of November, A. D. 1877, said complainant, by his solicitor, filed in said clerk's office his replication

43 to the answer of said defendant, The City of Chicago, in said entitled cause, which said replication is in the words and figures following, to wit:

Replication to answer of the City of Chicago.

In the circuit court of the United States, northern district of Illinois.
In chancery.

WILLIAM C. TEBBETTS
vs.
THE CITY OF CHICAGO ET AL.

The replication of William C. Tebbetts, complainant, to the answer of the City of Chicago, one of the defendants in the above entitled cause, to the amended bill of said complainant.

This repliant, saving and reserving unto *itself* now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that it will aver, maintain, and prove *its* said bill of complaint as amended to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied to by this repliant; without this, that any other matter or thing whatsoever in said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, con-
44 fessed or avoided, traversed or denied, is true. All which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

CHARLES A. GREGORY,
Complainant's Solicitor.

(Endorsed:) Filed Nov. 8, 1877. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 9th day of November, A. D. 1877, in the adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

WILLIAM C. TEBBETTS
vs.
THE CITY OF CHICAGO ET AL. } In chancery.

Now comes the complainant, by his solicitor, and it appearing to the court that the defendants the Mutual Life Insurance Company of Maine, Levi D. Boone, trustee, and James D. Bruner had duly appeared herein and had failed to answer the complainant's bill of complaint herein in conformity with the rules and practice of this court, and they
45 being each three times solemnly called come not, but make default, it is thereupon considered by the court that their defaults be entered, and that the complainant's bill of complaint and the matters and things therein contained be taken as confessed and true as against them.

And on motion of said complainant's solicitor, it is ordered by the court that this cause be referred to Henry W. Bishop, esq., the master in chancery of this court, to take proofs herein and report the same to the court together with the amount due complainant herein.

Afterwards, to wit, on the 23d day of November, A. D. 1877, said defendant, Charles A. Gregory, filed in said clerk's office his answer in said entitled cause, which said answer is in the words and figures following, to wit:

Answer of Charles A. Gregory.

In the United States circuit court for the northern district of Illinois.
In chancery.

WILLIAM C. TEBBETTS
vs.
THE CITY OF CHICAGO, CHARLES A. GREGORY et al. } Bill.

The answer of Charles A. Gregory, one of the defendants in said above named cause.

This defendant says that he admits that all the allegations of said bill are true, and that he has no interest in said suit, and asks to
46 be hence dismissed with his proper costs in this behalf sustained, &c.

Chicago, November, 1877.

CHARLES A. GREGORY, *pro se.*

(Endorsed:) Filed Nov. 23, 1877. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the eleventh day of December, A. D. 1877, in the said adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Thomas Drummond, judge, is the following entry, to wit:

WILLIAM C. TEBBETTS
vs.
THE CITY OF CHICAGO, THE UNION MUTUAL Life Insurance Company of Maine, Charles A. Gregory, Levi D. Boone, James D. Bruner. } In chancery.

This cause having come on to be heard upon the pleadings filed therein, and upon the proofs taken in said cause on the hearing thereof, and upon the stipulations and the oral admissions of the counsel for the respective parties taken at said hearing, and the default for want of answer of the said Union Mutual Life Insurance Company of Maine, and of said Boone and of said Bruner having heretofore been entered in said cause and the said bill taken as confessed as against
47 them, and the cause having been argued by Charles A. Gregory, esquire, on behalf of said complainant, and by Francis Adams, esquire, on behalf of said defendant, The City of Chicago, and thereupon the court doth find:

That the allegations in said bill are true as therein stated; that the court has jurisdiction of the subject-matter of this cause and has jurisdiction of all the persons and corporations named as parties to this suit, and that the equity of the case is with the complainant, and that on the fifth day of October, 1868, and for a long time theretofore said Charles A. Gregory was the owner in fee of that lot of land situate in the city of Chicago, Cook County, Illinois, known as the east thirty-six (36) feet of the west forty (40) feet of lot one (1), in block one

hundred and forty-one (141), school section addition to Chicago, and that at the same time said premises were subject to two (2) certain trust deeds, as hereinafter described, and were not otherwise in any way encumbered; that said Gregory was in the actual possession and occupancy of said lot before that time and from thence until about the fourteenth day of May, 1869.

That on the 25th day of May, 1868, the common council of the said city of Chicago passed an order for the extension or opening of Dearborn street, in said city, from its then southern terminus to the
48 north line of Jackson street, of the width of eighty (80) feet, the dividing lines between blocks 120 and 141, and between blocks 121 and 140, of school section addition to Chicago, to be the centre of said street as extended as opened; that said premises lay wholly within the limits of such proposed extension; and thereupon the commissioners of the board of public works of said city proceeded to and did ascertain and assess the damages and recompense due the owners of such land respectively, and at the same time determine what real estate would be benefited by such improvement, and assess the damages together with the costs of proceedings on the real estate by them deemed benefited in proportion as nearly as might be to the benefit resulting to each separate lot or parcel; and before proceeding to make such assessment, said commissioners in all things complied with the law, and that the said commissioners in and by said assessment did determine and appraise, in writing, to the owner or owners, the value of the real estate appropriated for the said improvement and the injury arising to them respectively from the condemnation thereof, to be awarded to such owners respectively, as damages, after making due allowance therefrom for any benefit which such owners might respectively derive from such improvement.

And said commissioners did complete their said assessment in
49 due time, and did thereupon sign the assessment roll thereof and did in all further respects thereto comply with the law and charter of said city and the ordinances thereunto relating, and having so proceeded in respect to all proper notices, &c., the said commissioners did in apt time apply to the common council for a confirmation of said assessment, and on the fifth day of October, 1868, said common council did confirm said assessment in manner required by law and no proceedings for appeal therefrom pending, said assessment did in said October, 1868, become a lawful and sufficient condemnation of the land ordered to be appropriated thereby. That in and by said assessment and confirmation and condemnation, there was condemned the lot first above mentioned, which lay wholly within the street so to be opened, so that no benefit was charged thereon; and that in and by said assessment, damages were assessed and awarded in respect of said lot and to the owner of the same the sum of $36,000. That thereupon it became and was the duty of the city of Chicago to proceed with due diligence to collect money by the means provided by law, sufficient to pay the said award of $36,000 and to pay the same to the persons entitled thereto within a reasonable time. That the city of Chicago had actual notice on the
14th day of May, and ever since who were the owners who were
50 entitled to receive respectively the proper share and shares of said damages and award.

That there was a certain trust deed which was a valid lien on said lot, dated July 10th, 1866, and duly recorded July 25th, 1866, in book 333 of deeds, at page 603, in the recorder's office of said Cook County, given by James D. Bruner, the grant or of said Gregory, while the said

Bruner was the owner of said lot and given to secure a promissory note of ten thousand dollars and interest thereon at the rate of eight per cent. per annum, payable semi-annually, payable in one year from its date unto The Union Mutual Life Insurance Company, of Maine, being for money loaned by said company to said Bruner, said note held and owned by said company; and that there was another trust deed which was a valid lien on said lot, dated June 12th, 1867, and duly recorded as given, to secure a promissory note of eight thousand dollars, on which $2,000 had been paid, and interest thereon at the rate therein mentioned, payable two (2) years after its date unto the said Union Mutual Life Insurance Company, of Maine, for money loaned to said Bruner by said company, held and owned by said insurance company; said two notes being made by said Bruner, in each of which said two trust deeds said Levi D. Boone was named as the trustee; that said Boone was the general agent of said insurance company of Maine, residing in
51 and doing business for said company at said Chicago, and was such agent on and before May 14th, 1869, and all the time since up to within about one year before date of this decree; that said Gregory was owner of said lot as aforesaid, but subject to said two trust deeds, which were a paramount lien on said land; that said premises were sold and conveyed to said Gregory by said Bruner, by deed dated September 10th, 1867, and recorded in said county, in book 409 of deeds at page 482, and so sold and conveyed subject to said two trust deeds and the notes therein described.

That on or about the 14th day May, 1869, the said city of Chicago by its board of public works made and delivered to said Gregory a certain instrument in writing and printing of the following words and figures, to wit:

Special assessment voucher.

(Warrant No. 562.)

City of Chicago, for the board of public works, to C. A. Gregory, Dr.

For amount of damages awarded to E. 36 f't of W. 40 f't of lot 1, block 141, school section addition to Chicago, the same having been condemned for the extension or opening of Dearborn street, from its present southern terminus to the
52 north line of Jackson st., of the width of 80 feet, the dividing lines between block 120 and 140 of school section addition to Chicago, to be the centre of said street, extended or opened, being payment in full for all claims for damages to the same by reason of said proceedings.....	$36,000
Less amount paid on acc't March 22, 1869.....	20,000
Balance due.....	$16,000

Comptroller.

Paid six thousand dollars on acc't of this bill, June 5th, 1869.

W. KIMBALL,
City Comptroller.
Per CHASE.

Approved by the board.

A. H. BURLEY,
President.

That on the back of said instrument were the following words in printing and writing, to wit:

Special voucher.

No. , H. C. A. Gregory.

Warrant 562	$16,000
Paid on ⅜ June 5, '69	6,000

Comptroller of the city of Chicago, pay the within amount to Dr. L. D. Boone, as trustee and general agent of the Union Mutual Life Insurance Company, of Maine, in full of principal due said company for lien on within land without recourse to me.

May 15, '69.

(Signed) C. A. GREGORY.

Without recourse on me.

L. D. BOONE,
Trustee, &c.

53 That the said city of Chicago paid to said Gregory twenty thousand dollars on account of the said damages; that said Gregory, his wife joining, by deed thereupon quit-claimed all interest in said lot to said city of Chicago; that said Gregory thereupon about the fifteenth day of May, 1869, endorsed over and delivered over to said L. D. Boone, as trustee and agent for the said Union Mutual Life Insurance Company the said instrument in writing above called a voucher; that said Boone as such agent and trustee made demand then and there upon the city of Chicago for the remainder of the damages; that said city paid to said Boone as such agent and trustee the sum of six thousand dollars on the fifth day of June, 1869, which money said Boone applied on said note and trust deed of the date of June 12, 1867, and which with certain money which had theretofore been paid on said note was sufficient to cancel and pay the same; that said Boone as such agent and trustee demanded the balance of said damages in the summer of 1869 of said city of Chicago, and repeatedly demanded the same thereafter at various times of said city of Chicago, as such agent and trustee, while holding said note of $10,000 and said title as trustee; that said city of Chicago has never paid on account of said damages any other or further sum of money than as above
54 recited; that is to say, not to exceed twenty-six thousand dollars in all; that on the 21st day of May, 1869, the city of Chicago gave notice through its then corporation newspaper by due publication of such notice according to law, as required by the charter of said city that it should do when the assessment had been collected, that it had collected the money and the same was ready in the hands of the city treasurer to be paid over to the parties entitled to damages awarded for property condemned under and by virtue of said assessment and condemnation; and that then under and by virtue of said condemnation proceedings said city of Chicago entered into and took possession of all of said lot on the first (1st) day of June, 1869, for a street and has ever since kept and used the same for a public street.

That afterwards, in July and August, 1872, said Boone as trustee under said trust deed of the date of July 10, 1866, above referred to, advertised said land for sale under and by virtue of and in accordance with the power of sale in said trust deed contained, and sold the same

for the purpose of foreclosing said trust deed in order to collect the amount of money due on said note of ten thousand dollars, the same having become due, and neither said Bruner nor any other person having paid the same; and that the Union Mutual Life Insurance Company of Maine on the 16th day of August, 1872, bought said land
55 at such trustee's sale; and said Boone as trustee made and delivered the trustee's deed, dated August 16, 1872, of conveyance of said lot to said company, conveying said land to said insurance company, and recorded in said Cook County, September 5, 1872, book 149, page 423; that said company bid at such sale sufficient to pay all the principal and interest and costs on said note, of which it was then and there the holder; and said trustee marked said note as cancelled and paid by such sale; that afterwards, in December, 1872, William C. Tebbetts, the complainant, bought of said insurance company the said lot of land and all claim which said company had either against said city of Chicago for said damages or against said Bruner on said note and therefor paid to said insurance company upwards of ten thousand dollars in cash, being sufficient money in amount to fully reimburse said insurance company; and thereupon said insurance company made and delivered to said complainant a deed of conveyance of said land, and said Boone, as agent and trustee, endorsed in writing without recourse in blank, and delivered over to said Tebbetts the aforesaid voucher at the same time with said deed, which said voucher is produced in court on the hearing: said deed to said complainant bearing
56 date and being executed on the 27th day of December, 1872; that said complainant by his agent for that purpose afterwards notified the said city of Chicago of the rights of said complainant and demanded of said city the money or the land in 1873, and failing to get satisfaction in November, 1873, said complainant again demanded the same of said city by suit in ejectment against said city for said land in the superior court of Cook County, to which suit the city appeared and made defence; and failing to obtain judgment on the first trial of the said suit the plaintiff therein dismissed the same; and afterwards again demanded of said city of Chicago the principal sum and reasonable interest on the same, or said land, and failing to get satisfaction brought suit in ejectment against said city for said land in the circuit court in and for the northern district of Illinois, at the term of said court, to which suit the said city appeared and made defence and before any judgment had been rendered in said suit the plaintiff therein dismissed said suit and again demanded payment of said money and applied to the common council of said city for the same, or some settlement of the claim, which demand being unattended to said complainant brought the present suit.

That the city of Chicago has for an unreasonable length of time
57 failed to pay the remainder of said damages to the owner of said lot, and has vexatiously withheld the same; that said Tebbetts is justly entitled to the remainder of said damages, together with interest thereon to the date of this decree, as damages, at six per cent. per annum, to commence on the first day of January, A. D. 1870, and deducting therefrom $820, as of the date of July 12th, 1872, as and for certain interest paid on said note of said Bruner by said Stearns and others, while said note was held by said insurance company, and before said foreclosure.

And this court doth order, adjudge, and decree that the said complainant, William C. Tebbetts, is entitled to have and recover of and from the said city of Chicago the sum of ten thousand dollars, together with

certain interest on said sum at the rate of six per cent. per annum, and the same being computed, with the deduction aforesaid, the aggregate is the sum of thirteen thousand nine hundred and fifty-three dollars and thirty-three cents, including principal and interest; and it is hereby ordered that the city of Chicago do pay over to said Tebbetts, or to his solicitor in this suit, the sum of thirteen thousand nine hundred and fifty-three dollars and thirty-three cents, together with interest thereon at six per cent. per annum from the date of entering this decree
58 till payment of the same; and that the said defendant do pay the costs of this suit, and that the complainant do have his costs to be paid by said city of Chicago.

And upon and at the time of such payment the title to said land shall absolutely vest in the said city of Chicago for a street as aforesaid, and all the parties to this suit shall be forever barred from having or claiming any right, title, or interest in the same as against said city of Chicago; and that said Bruner shall be discharged of and from all liability on said note or notes aforesaid; and it is further adjudged that said Charles A. Gregory has had no interest in said award or damages, or in said land, since the 15th day of May, A. D. 1869, as against the said city of Chicago, by virtue of the premises or otherwise; and upon payment of said sum as aforesaid, said Tebbetts shall surrender up said voucher to said city of Chicago.

And it is ordered that the complainant shall have such further order or orders as may be necessary to enforce this decree from time to time.

And thereupon the defendant, The City of Chicago, by its solicitor, prayed an appeal to the Supreme Court of the United States, which is allowed upon said defendant giving bond herein in the penal sum of twenty thousand dollars, with security to be approved by the court.

59 And on the same day, to wit, the eleventh day of December, A. D. 1877, the said defendant, The City of Chicago, filed in said clerk's office its certificate of evidence in said entitled cause, which said certificate of evidence is in the words and figures following, to wit:

Certificate of evidence.

60 In the United States circuit court, northern district of Illinois, October term, 1877. In chancery.

WILLIAM C. TEBBETTS *vs.* THE CITY OF CHICAGO, CHARLES A. GREGORY, James D. Bruner, Levi D. Boone, and The Union Mutual Life Insurance Company of Maine.	14792.

I, Thomas Drummond, judge of the circuit court of the United States in and for the northern district of Illinois, do hereby certify that on the hearing of the above-entitled cause in said court on the 28th day of November, 1877, the following evidence was introduced, to wit:

The complainant offered and read in evidence the following:

1st. A deed from Elisha S. Wadsworth and wife to James D. Bruner, of date Dec. 28, 1865, as follows:

This indenture, made this twenty-eighth day of December, in the year of our Lord one thousand eight hundred and sixty-five (1865), between

Elisha S. Wadsworth and Charlotte S., his wife, of the city of Chicago, county of Cook, and State of Illinois, party of the first part, and James D. Bruner, of the same place aforesaid, party of the second part, witnesseth:

That the said party of the first part, for and in consideration
61 of the sum of twenty-seven thousand three hundred ($27,300.00) dollars, in hand paid by the said party of the second part, (the receipt whereof is hereby acknowledged, and the said party of the second part forever released and discharged therefrom), hath granted, bargained, sold, remised, released, conveyed, aliened, and confirmed, and by these presents doth grant, bargain, sell, remise, release, convey, alien, and confirm unto the said party of the second part, and to his heirs and assigns forever, all the following described lot, piece, or parcel of land, situate in the city of Chicago, county of Cook, and State of Illinois, and known and described as follows, to wit:

Commencing at a point in the north line of lot one (1), block one hundred and forty-one (141), school section, addition to Chicago, fifty-one (51) feet west of the northeast corner of said lot one (1), and running thence west along said north line forty-two and three-fourths (42¾ths) feet; thence south in a line parallel to the east line of said lot one (1) one hundred and ninety-eight (198) feet, more or less, to the south line of said lot one (1); thence east, along said south line, forty-two and three-fourths (42¾ths) feet; thence north, in a line parallel to the east line of said lot one (1) one hundred and ninety-eight (198) feet, more or less, to the place of beginning, subject to the rights of the city and the
62 public in the alley on the south line of said lot one (1), together with all and singular the hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim or demand whatsoever of the said party of the first part, either in law or equity, of, in, and to the above-bargained premises with the hereditaments and appurtenances.

To have and to hold the said premises above bargained and described, with the appurtenances, unto the said party of the second part, his heirs and assigns forever; and the said Elisha S. Wadsworth, party of the first part, for himself, his heirs, executors, and administrators, doth covenant, grant, bargain, and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents he is well seized of the premises above conveyed, as of a good, sure, perfect, absolute and indefeasible estate of inheritance in law in fee simple, and hath good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments and incumbrances of what kind or nature soever, and the above bargained premises in the quiet and peaceable possession of the said party of the
63 second part, his heirs and assigns against all and every person or persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part shall and will warrant and forever defend, except as to the buildings now standing upon said premises.

And the said Elisha S. Wadsworth and Charlotte S. Wadsworth, his wife, party of the first part, hereby expressly waive and release any and all right, benefit, privilege, advantage, and exemption under or by virtue of any and all statutes of the State of Illinois, providing for the ex-

emption of homesteads from sale on execution, or otherwise, and especially under the act entitled "An act to exempt homesteads from sale on execution," passed by the general assembly of the State of Illinois, A. D. 1851, and approved February 11, A. D. 1851, and an act entitled "An act to amend an act to exempt homesteads from sale on executions," passed by said assembly A. D. 1857, and approved February 17, 1857.

In witness whereof the said party of the first part hereunto set their hands and seals the day and year first above written.

E. S. WADSWORTH. [SEAL.]
CHARLOTTE S. WADSWORTH. [SEAL.]

[$20 int. rev. stamp, cancelled. $5 int. rev. stamp, cancelled $2.50 int. rev. stamp, cancelled.

64 STATE OF ILLINOIS,
Cook County, City of Chicago, ss:

I, Henry Brooks, a notary public in and for said city, in said county, in the State aforesaid, do hereby certify that Elisha S. Wadsworth and Charlotte S., his wife, who are personally known to me to be the same persons whose names are subscribed to the foregoing deed, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said instrument of writing as their free and voluntary act for the uses and purposes therein set forth and thereby conveyed all their right, title and interest in and to the premses described in said deed, and expressly waived and released all right, claim, benefit, privilege, advantage and exemption, under any and all homestead exemption laws, so called.

And the said Charlotte S., wife of the said Elisha S. Wadsworth, having been by me examined separate and apart, and out of the hearing of her said husband, and the contents and meaning of the said deed having been by me made known and fully explained to her, and having been by me fully informed of all her rights under the homestead acts passed by the legislature of the State of Illinois, the said Charlotte S. Wadsworth acknowledged that she had
65 freely and voluntarily executed the same and relinquished her dower, and all right, title, and interest to the lands and tenements therein mentioned, and expressly waived and released all right, claim, benefit, privilege, advantage, and exemption under any and all homestead exemption laws, so called, without the compulsion of her said husband, and that she does not wish to retract the same.

Given under my hand and notarial seal this twelfth day of January, A. D. 1866.

[NOTARIAL SEAL—HENRY BROOKS.] HENRY BROOKS,
Notary Public.

(Endorsed:)

STATE OF ILLINOIS,
Cook County, ss:

No. 107960.

This instrument was filed for record on the sixteenth day of January, A. D. 1866, and duly recorded in book 333 of deeds, page 74.

WM. L. CHURCH,
Clerk of Circuit Court and Ex Officio Recorder.

2nd. A trust deed from James D. Bruner to L. D. Boone, of date July 10, 1866, as follows:

This indenture, made this tenth day of July, in the year of our Lord one thousand eight hundred and sixty-six (A. D. 1866), between James D. Bruner and Eunice D. Bruner, his wife, of the city of Chicago, county of Cook and State of Illinois, parties of the first part,
66 and Levi D. Boone, of Waukegan, county of Lake, and State of Illinois, of the second part, witnesseth:

Whereas the above-named James D. Bruner is justly indebted to the Union Mutual Life Insurance Company of Maine in the sum of ten thousand ($10,000) dollars, to secure the payment of which he has executed his promissory note of even date herewith payable one year after date, with interest at eight per cent. per annum, payable semi-annually, both principal and interest being payable at the office of said insurance company in Boston, Massachusetts; and whereas the said parties of the first part are desirous to secure to the legal holder or holders of the said promissory note, whoever he or they shall be, the prompt payment of the same:

Therefore the said parties of the first part, in consideration of the premises, and in the further consideration of one dollar to them in hand paid by the said parties of the second part, the receipt whereof is hereby confessed, have and hereby do grant, bargain, sell, and convey unto the said party of the second part, his heirs, assigns, or successors, in trust forever, all the premises, situated in the city of Chicago, in the county of Cook and State of Illinois, and known and described as follows, to wit:

Commencing at a point sixty-four and three-fourths ($64\frac{3}{4}$) feet west
67 of the east line of lot number one (1) in block number one hundred and forty-one (141) on the south line of Monroe street, and running thence west on said south line of Monroe street thirty (30) feet; thence south, parallel with the east and west lines of said lot one (1) about one hundred and ninety (190) feet, to the alley in the rear of said lot one; thence east, on the north line of said alley, thirty (30) feet; thence north, on a line parallel with the said east and west lines of said lot one (1), to the place of beginning on the south line of Monroe street, being thirty (30) feet front on Monroe street, by one hundred and ninety feet in depth.

[Two dollars U. S. revenue stamp, $2. Two dollars U. S. revenue stamp, $2. Three dollars U. S. revenue stamp, $3. Three dollars U. S. revenue stamp, $3.]

To have and to hold the same, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging unto the said party of the second part, his heirs, assigns, or successors, in trust, hereinafter named, forever. In trust nevertheless, to wit: In trust that in case of default in the payment of the said note or the interest thereon, or any part thereof, or in case of a breach of any of the covenants or stipulations herein contained, then, on the application of the legal holder or holders of the said note, or any or either of them, it shall and may be lawful for the said party of the second part, his heirs, assigns,
68 or successors in trust to enter into and upon all and singular the premises hereby granted, or any part thereof, in the name of the said party of the second part, to receive all rents, issues, and profit thereof, and to sell and dispose of the said premises, and all the right, title, benefit, and equity of redemption of the said parties of the first part, their heirs or assigns therein, at public auction, at the north door of the court-house in the city of Chicago, meaning the court-house of the circuit court of Cook County, for the highest and best price the same will bring in cash, twenty (20) days' public notice having been

previously given of the time and place of such sale by advertisement in one of the newspapers at that time published in said city of Chicago, to adjourn such sale from time to time as may be thought expedient, and to make, execute, and deliver to the purchaser or purchasers at such sale good and sufficient deed or deeds of conveyance for the premises sold, and out of the proceeds or avails of such sale, after first paying all costs of advertising and sale, commissions, and all other expenses of this trust, including all moneys advanced for taxes, or other liens and assessments, with interest thereon at the rate of ten per cent. per annum, to pay the principal and interest due on said note according to the tenor and effect thereof, rendering the overplus (if any) unto the said
69 parties of the first part, their legal representatives or assigns, on reasonable requests, and it shall not be obligatory upon the purchaser or purchasers at any such sale to see to the application of the purchase money; which sale or sales so made shall be a perpetual bar, both in law and equity, against said parties of the first part, their heirs and assigns, and all other persons claiming the premises aforesaid, or any part thereof, by, from, through, or under said parties of the first part, or any of them.

And in trust further that after full payment of said note shall have been made, then the said Levi D. Boone, or his successor in trust, shall reconvey the premises hereinabove described unto the said party of the first part, or their heirs, assigns, or legal representatives, at their costs (provided said indebtedness is paid without sale thereof), and the said James D. Bruner, for himself, his heirs, executors, and administrators, covenant and agrees to and with the said party of the second part, his legal representatives or successor in trust, that at the time of ensealing and delivery of these presents he is well seized of said premises, and has good right, full power, and lawful authority to grant, bargain, and sell the same in manner and form as aforesaid, that the same are free and clear of all liens and incumbrances whatsoever (unless as hereinafter specified), and until said indebtedness is fully paid, or said premises
70 are sold by virtue hereof, he will pay all taxes and assessments thereon when and as the same become due and payable; and that he will cause any building upon said premises to be insured in some safe and responsible insurance company for the insurable value thereof, and upon the request of said party of the second part, or the legal holder of any of said indebtedness, assign the policy or policies of such insurance to said party of the second part as collateral hereto and keep the same so insured and the policies assigned as aforesaid, provided, however, that such insurance shall not be required for a greater sum than the amount of said indebtedness then unpaid.

And it is stipulated and agreed that in case of default in any of said payments of principal or interest as aforesaid, or of a breach of any of the covenants or agreements herein, then and in that case the whole of said principal sum hereby secured and the interest to the time of sale according to the tenor and effect of said indebtedness may at once at the option of the legal holder or holders thereof become due and payable, and the said premises be sold in like manner and with the same effect as if the said indebtedness had matured.

And, further, that in case of the death, resignation, removal from the State of Illinois, or inability to act of the said party of the second part, then William Hansbrough, of said city of Chicago, shall be and
71 is hereby appointed and made the successor in trust herein, with like power and authority as the said party of the second part has

in and about the management of the said trust estate, and the said premises shall become vested in such new trustee accordingly.

And the said James D. Bruner and Eunice B. Bruner, his wife, parties of the first part, hereby expressly waive and release any and all right, benefit, privilege, advantage, and exemption under or by virtue of any and all statutes of the State of Illinois providing for the exemption of homesteads from sale or execution or otherwise, and especially under the act entitled "An act to exempt homesteads from sale or execution," passed the general assembly of the State of Illinois, A. D. 1851, and approved February 11, A. D. 1851, and an act entitled "An act to amend an act to exempt homesteads from sale on execution," passed by said assembly, A. D. 1857, and approved February 17, 1857.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

(Signed) JAMES D. BRUNER. [SEAL.]
EUNICE B. BRUNER. [SEAL.]

Signed, sealed, and delivered in presence of—

72 STATE OF ILLINOIS,
County of Cook, City of Chicago, ss:

I, Edward A. Rucker, a notary public in and for Cook County, in the State aforesaid, do hereby certify that James D. Bruner and Eunice B. Bruner, his wife, who are personally known to me as the same persons whose names are subscribed to the within and annexed deed of trust as having executed the same, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said instrument of writing as their free and voluntary act and deed for the uses and purposes therein set forth.

And the said Eunice B. Bruner, wife of the said James D. Bruner, having been by me examined separate and apart and out of the hearing of her husband, and the contents and meaning of the said instrument of writing having been by me fully made known and explained to her, and she also by me being fully informed of her rights under the homestead exemption laws of the State of Illinois, acknowledged that she had freely and voluntarily executed the same and relinquished her dower and also all other right, title, and interest to the lands and tenements therein mentioned, and also all her rights and advantages under and by virtue of all laws of the said State relating to the exemption of homesteads, without compulsion of her said husband, and that she
73 does not wish to retract the same.

Given under my hand and notarial seal this tenth day of July, in the year of our Lord one thousand eight hundred and sixty-six.

[NOTARIAL SEAL.] (Signed) E. A. RUCKER,
Notary Public.

(Endorsed:)
STATE OF ILLINOIS,
County of Cook:

119935.

This instrument was filed for record on the twenty-fifth day of July, A. D. 1866, at the hour of o'clock, m., and duly recorded in book 333 of deeds, and on page 603 of the aforesaid book.

WM. L. CHURCH, *Clk.*

3d. A deed from Levi D. Boone to the Union Mutual Life Insurance Company of Maine, of date August 16, 1872, as follows:

This indenture, made this sixteenth day of August, A. D. 1872, between Levi D. Boone, trustee, of the city of Chicago, in the county of Cook and State of Illinois, party of the first part, and the Union Mutual Life Insurance Company of Maine, a corporation, &c., of the State of Maine, party of the second part, witnesseth:

That whereas James D. Bruner, formerly of the city of Chicago,
74 in the county of Cook and State of Illinois, did, by a certain trust deed, dated the tenth day of July, A. D. 1866, convey to the said party of the first part, as trustee, all the premises hereinafter described, to secure the payment of his one certain promissory note, in said trust deed particularly mentioned, bearing date the tenth day of July, A. D. 1866 payable to the order of the Union Mutual Life Insurance Company, of Maine, for ten thousand ($10,000.00) dollars, one year from the date thereof, with interest at the rate of eight per cent. per annum, payable semi-annually, being for money loaned on the hereinafter described premises, in which deed Eunice B. Bruner, his wife, did join.

And whereas it was expressly provided in said trust-deed that in case of default in payment of said promissory note and interest, or either or any part thereof, then on the application of the holder of said note it should be lawful for said Levi D. Boone to sell and dispose of said premises at public auction, at the north door of the court-house, in the city of Chicago, in the State of Illinois, for the highest and best price the same would bring in cash, twenty days' notice of such sale having been first given in one of the newspapers published in said city of Chicago, and to make and deliver to the purchaser or purchasers at such sale good and sufficient deed or deeds of conveyance for the
75 premises sold, and that such sale or sales so made should be a perpetual bar, both in law and equity, against said James D. Bruner and wife, their heirs and assigns, and all other persons claiming said premises, or any part thereof, by, through, or under said party of the first part herein; which said trust-deed was recorded in the recorder's office in the county of Cook, in the State of Illinois, in book 333 of deeds, page 603.

And whereas, also, default hath been made in the payment of said promissory note and interest, payable and due as aforesaid, and the said Union Mutual Life Insurance Company of Maine, the legal holder thereof, having applied to me as such trustee, to cause said premises herein described to be sold for the purposes mentioned in, and in accordance with the provisions of said trust-deed, I, the undersigned, party of the first part, on the twenty-third day July, A. D. 1872, caused a notice to be published in the Chicago Evening Mail, a newspaper published in the city of Chicago, in the county of Cook and State of Illinois, that said premises hereinafter described would, on Friday the sixteenth (16th) day August, A. D. 1872, at half past twelve o'clock in the afternoon of said day, be sold at public auction, for cash, at the north door of the court-house, in said city of Chicago, meaning the court house of
76 the circuit court of Cook County, Illinois (said court-house being situated on the corner of Adams and Lasalle streets, in said city of Chicago, and there being two north doors to said court-house, notice was given that the easterly door of the two north doors aforesaid, was intended by said notice as the place at which said sale would be made), by virtue of said deed of trust, and in pursuance of such application; which said notice was published daily for twenty (20) days, consecu-

tively, in said paper, commencing on the twenty-third (23d) day of July, A. D. 1872.

A copy of which said notice is here inserted, together with the publisher's certificate of the publication of the same, and made a part of this deed, as follows :

Trustee's sale.

Whereas James D. Bruner and Eunice B. Bruner, his wife, of the city of Chicago, county of Cook, and State of Illinois, did, on the tenth day of July, 1866, execute and deliver to the undersigned, as trustee, a certain deed of trust of the premises hereinafter described, to secure the payment of a certain promissory note in said deed described, and bearing even date therewith, for the sum of ten thousand ($10,000) dollars, together with the interest thereon, said note being payable one
77 year after date; which said trust deed was recorded in the office of the recorder of Cook County, Illinois, in book 333 of deeds, and on page 603 of said book.

And whereas said note is long past due and still remains unpaid, and whereas it is provided in said deed of trust that in case of default in the payment of said note or the interest thereon, or any of the covenants therein contained, then on the application of the legal holder of said note it shall and may be lawful for the said trustee, or his successor in trust, to enter into and upon all and singular the premises hereby granted, or any part thereof, and to sell and dispose of the said premises and all the right, title, benefit, and equity of redemption of the said parties of the first part, their heirs or assigns therein, at public auction, at the north door of the court-house, in the city of Chicago, meaning the court-house of the circuit court of Cook County, for the highest and best price the same will bring in cash, twenty days' public notice having been previously given of the time and place of such sale by advertisement in one of the newspapers at that time published in said city of Chicago, and to make, execute, and deliver to the purchaser or purchasers at such sale good and sufficient deed or deeds of conveyance of the premises sold, and out of the proceeds or avails of such sale,
78 after first paying all costs of advertising and sale, commissions, and all other expenses of this trust, to pay the principal and interest due on said note, according to the tenor and effect thereof, rendering the overplus thereof (if any) unto the said parties of the first part, their legal representatives or assigns.

And whereas the legal holder of the said note has applied to the undersigned to sell said premises mentioned in said trust deed and hereinafter described, for the purpose of paying said note and the interest due thereon, and the expenses of said sale as provided in said trust deed:

Now, therefore, by virtue of the power and authority in me vested by said deed of trust, I, the undersigned, as trustee, will, on Friday, the 16th day of August, A. D. 1872, at half-past twelve (12½) p. m., at the north door of the court-house of the circuit court of Cook County, Illinois (said court-house now being situated on the corner of Adams and Lasalle streets, in said city of Chicago, and there being two north doors to said court-house, notice will be taken that the easterly door of the two north doors aforesaid is intended by this notice as the place at which said sale will be made), sell for the highest and best price the same will bring in cash the premises in said deed of trust de-
79 scribed, to wit: Commencing at a point sixty-four and three-fourths (64¾) feet west of the east line of lot number one (1), in

block number one hundred and forty-one (141), on the south line of Monroe street, and running thence west on said south line of Monroe street thirty (30) feet; thence south parallel with the east and west lines of said lot one (1), about 190 feet to the alley in the rear of said lot one (1); thence east on the north line of said alley thirty (30) feet; thence north on a line parallel with the said east and west lines of said lot one (1), to the place of beginning; on the south line of Monroe street, being thirty (30) feet front on Monroe street, by 190 feet deep (more or less), said lot being in the school section addition to Chicago, county of Cook, and State of Illinois, together with the improvements thereon, and all and singular the privileges, appurtenances, and hereditaments thereunto belonging, and all the right, title, benefit, and equity of redemption, and homestead rights of the said James D. Bruner and Eunice B. Bruner, their heirs and assigns, in and to the said premises.

July 23. 1872.

LEVI D. BOONE, *Trustee.*

This certifies that a notice, of which the annexed printed slip is a true copy, was published for twenty successive insertions, to wit,
80 twenty times in the daily edition of the Chicago Evening Mail, a newspaper published in the city of Chicago, of general circulation throughout Cook County and the State of Illinois; that the date of the first paper containing the same was the 23d day of July, A. D. 1872; that the date of the last paper containing the same was the 14th day of August, A. D. 1872, and that we have received dollars for publishing the same.

Dated at Chicago, this 16th day of August, 1872.

E. H. TALBOTT, *Publisher.*

July 23. $56.00.

LEVI D. BOONE.

And whereas also at the hour of half-past twelve o'clock, in the afternoon, on the sixteenth day of August, A. D. 1872, the said premises having been by the said party of the first part, in the manner prescribed in and by said trust deed, and at the place last aforesaid, in pursuance of said notice, offered for sale at public auction, to the highest bidder for cash, and the said party of the second part having been the highest and best bidder therefor, and having bid for the tract hereinafter named the sum of five thousand ($5,000.00), the same was then and there struck off and sold to said company by me, as such trustee.

Now, therefore, in consideration of the premises, and of the sum of five thousand ($5,000.00) dollars, so as aforesaid bid for said premises, and to me in hand paid, the receipt whereof is hereby acknowledged,
81 I, Levi D. Boone, trustee as aforesaid, do hereby remise, release, and quit-claim to the said party of the second part, its successors and assigns, forever, all the right, title, and interest, as well in law as in equity, which I have acquired by virtue of said trust deed above mentioned, of, in, and to all that tract, piece, or parcel of land situate in the county of Cook and State of Illinois, and described as follows, to wit: Commencing at a point sixty-four and three-fourths (64¾) feet west of the east line of lot number one (1), in block number one hundred and forty-one (141), on the south line of Monroe street, and running thence west on said south line of Monroe street thirty (30) feet; thence south, parallel with the east and west lines of said lot one (1) about one hundred and ninety (190) feet to the alley in the rear of said lot one (1);

thence east on the north line of said alley thirty (30) feet; thence north on a line parallel with the said east and west lines of said lot one (1) to the place of beginning on the south line of Monroe street, being thirty (30) feet front on Monroe street by one hundred and ninety (190) feet deep (more or less), said lot being in the school section addition to Chicago, county of Cook and State of Illinois, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversion, remain-
82 ders, rents, issues, and profits thereof, and also all the estate, right, title, and interest, claim or demand whatsoever, as well in law as in equity, of the said party of the first part of, in, and to the same and every and any part thereof, and all right, benefit, and equity of redemption and homestead rights of the said James D. Bruner and Eunice B. Bruner, their heirs and assigns in and to the said premises; to have and to hold the same as fully and as absolutely as the said party of the first part can, by virtue of the power and authority in him in and by said trust deed vested, convey the same unto the said party of the second part, its successors and assigns forever.

In witness whereof the party of the first part hath hereunto set his hand and seal this day and year first above written.

The words "his heirs" erased and "its successors" inserted in the fourth line from the bottom before signing.—L. D. B.

[SEAL.] LEVI D. BOONE,
Trustee.

[U. S. internal revenue stamp, $5,00, canceled.]

83 STATE OF ILLINOIS,
Cook County, City of Chicago, ss:

I, G. L. Hoodless, a notary public in and for said city of Chicago, in the State aforesaid, do hereby certify that Levi D. Boone, who is personally known to me as the same person whose name is subscribed to the following trustee's deed, appeared before me this day in person and acknowledged that he signed and delivered the said instrument of writing as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 16th day of August, A. D. 1872.

[NOTARIAL SEAL.] G. L. HOODLESS,
Notary Public.

(Endorsed:)
STATE OF ILLINOIS,
Cook County, ss:

No. 54150.

I certify this instrument to be filed for record Sept. 5, A. D. 1872, recorded in book 149 of records, page 423.

N. T. GASSETTS, *Recorder.*

4th. A deed from the Union Mutual Life Insurance Company of Maine, to William C. Tebbetts, of date December 27, 1872, as follows:

84 The grantor, The Union Mutual Insurance Company of Maine, a corporation subsisting by virtue of an act of the legislature of the State of Maine, and having its principal office in the city of Boston,

in the county of Suffolk and State of Massachusetts, for the consideration of twenty-two thousand ($22,000.00) dollars in hand paid, convey and quit-claim to William C. Tebbetts, of the city of Boston, county of Suffolk and State of Massachusetts, all interest in the following described real estate, commencing at a point sixty-four and three-fourths (64¾) feet west of the east line of lot number one (1), in block one hundred and forty-one (141), on the south line of Monroe street, and running thence west on said south line of Monroe street thirty (30) feet; thence south, parallel with the east and west lines of said lot one (1) about one hundred and ninety (190) feet to the alley in the rear of said lot one (1); thence east on the north line of said alley thirty (30) feet; thence north on a line parallel with said east and west lines of said lot one (1) to the place of beginning, on the south line of Monroe street, being thirty (30) feet front on Monroe street by one hundred and ninety (190) feet deep (more or less), said lot being in the school section addition to Chicago, situated in the county of Cook, in the State of
85 Illinois, hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of this State.

Dated this twenty-seventh day of December, A. D. 1872.

In witness whereof the Union Mutual Life Insurance Company of Maine has caused its corporate seal to be hereunto affixed and these presents to be signed by its president and secretary the day and year above written.

{ SEAL UNION MUT. LIFE INS. CO. }

HENRY S. WASHBURN,
President.
WHITING H. HOLLISTER,
Secretary.

FREEMAN NICKERSON.

STATE OF MASSACHUSETTS,
County of Suffolk, City of Boston, ss:

I, Daniel Sharp, a notary public in and for said city, in the State aforesaid, do hereby certify that Henry S. Washburn, president, and W. H. Hollister, secretary of the Union Mutual Life Insurance Company of Maine, who are both personally known to me to be the same persons whose names are subscribed to the foregoing deed, appeared before me this day each in person, and severally acknowledged that they signed, sealed and delivered the said deed as the free and voluntary act of the said the Union Mutual Life Insurance Company
86 of Maine, for the uses and purposes therein set forth, and that they were and are the officers respectively of said company as they are above described; that they know the corporate seal of said company, and that the seal affixed to said deed is such corporate seal, and that they freely and voluntarily executed said deed for and in behalf of said company.

Given under my hand and notarial seal this twenty-fourth day of February, A. D. 1876.

[NOTARIAL SEAL.]

DANIEL SHARP,
Notary Public.

Endorsed:)
REC. 299—3

STATE OF ILLINOIS,
Cook County, ss:

Doc. No. 90,223.

I, James Stewart, recorder within and for the county and State aforesaid, do hereby certify that the within and foregoing instrument of writing was filed for record on the 13 day of June, A. D. 1876, at 11 o'clock a. m., and duly recorded in volume 643 of records, on page 182. In testimony whereof I have hereunto set my hand the day and year aforesaid.

JAS. STEWART,
Recorder.

5th. A deed from James D. Bruner to Charles A. Gregory, of date September 9, 1867, as follows:

87 This indenture, made this ninth day of September, in the year of our Lord one thousand eight hundred and sixty-seven, between James D. Bruner and his wife, of St. Louis, in the State of Missouri, parties of the first part, and Charles A. Gregory, of Chicago, in the State of Illinois, party of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the sum of ten thousand ($10,000) dollars, in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part forever released and discharged therefrom, have granted, bargained, sold, remised, released, conveyed, aliened, and confirmed, and by these presents do grant, bargain, sell, remise, release, convey, alien, and confirm unto the said party of the second part, and to his heirs, and assigns forever, all the following described lot, piece, or parcel of land situate in the county of Cook, and State of Illinois, and known and described as follows, to wit:

That thirty-six (36) feet east of and adjoining the west four feet of lot number one (1), of block number one hundred and forty one (141), meaning that piece of land thirty-six feet front on Monroe street, and running back to the rear of said lot of equal width with said front
88 and of the full depth of said lot as laid out and platted on map on record in the recorder's office for the said Cook County, in book of maps, at page .

Said premises are intended to include all that land of said party of the first part lately condemned by the city of Chicago, for the extension of Dearborn street, south from Monroe street to Jackson street, also all the right, title, and interest of said party of the first part in said lot one (1) not heretofore conveyed away, and also all the right of said party of the first part to any and all damages awarded for condemnation of any part of said premises by said city of Chicago, together with and all singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, or demand whatsoever of the said parties of the first part, either in law or equity, of, in, and to the above bargained premises with the hereditaments and appurtenances; to have and to hold the said premises above bargained and described with the appurtenances unto the said party of the second part, his heirs and assigns forever. And the said James D. Bruner, party of the first part, for himself and his heirs, executors, and administrators, doth cove-

89 nant, grant, bargain, and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivering of these presents, that he is well seized of the premises above conveyed, as of a good, sure, perfect, absolute, and indefeasable estate of inheritance in law, in fee simple, and hath good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, and incumbrances of what kind and nature soever, and the above bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every other person or persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part shall and will warrant and forever defend.

The said premises are conveyed subject to an incumbrance for sixteen thousand dollars, which said incumbrance said party of the second part, hereby agrees to assume to the extent of sixteen thousand dollars, but every other charge or incumbrance said party of the first part agrees to pay. Said premises are also conveyed subject to the said condemnation by said city of Chicago. Said party of the first part hereby ex-

90 pressly waive and release any and all right, benefit, privilege, advantage, and exemption under and by virtue of any and all statutes of the State of Illinois, providing for the exemption of homesteads from sale on execution or otherwise, and especially under the act entitled "An act to exempt homesteads from sale on execution," passed by the general assembly of the State of Illinois A. D. 1851, and approved February 11, A. D. 1851, and an act entitled "An act to amend an act entitled 'An act to exempt homesteads from sale on execution,'" passed by said assembly A. D. 1857, and approved February 17, A. D. 1857.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

J. D. BRUNER. [SEAL.]

[$10 U. S. internal revenue stamp, cancelled.]

STATE OF ILLINOIS,
Cook County, ss:

I, Daniel L. Boone, a notary public in and for said county in the State aforesaid, do hereby certify that James D. Bruner, personally known to me to be the same person whose name is subscribed to the foregoing warranty deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument in writing as his free and voluntary act, for the uses and purposes therein set forth.

91 Given under my hand and notarial seal this 9th day of September, A. D. 1867.

[NOTARIAL SEAL.] DAN'L L. BOONE,
Notary Public.

(Endorsed:)

Received of Charles A. Gregory the full consideration of the within deed this 9th day of Sept., 1867.

JAMES D. BRUNER.

[2-cent int. rev. bank check stamp, cancelled.]

STATE OF ILLINOIS,
Cook County:

No. 146,371.

This instrument was filed for record on the 10th day of Sept., A. D. 1867, at the hour of o'clock, m., and duly recorded in book 409 of deeds, at page 482.

WM. L. CHURCH,
Clerk of Circuit Court and ex-Officio Recorder.

6th. A certain document referred to in the bill of complaint as a voucher and the endorsements thereon, as follows:

Special assessment voucher.

CHICAGO, *May 14th*, 1869.

Warrant No. 562.

City of Chicago for the board of public works to C. A. Gregory, Dr.

For amount of damages awarded to E. 37 ft. of W. 40 ft. of lot 1, block 141, school section addition to Chicago, the same having been condemned for the extension or opening of Dearborn street from its present southern terminus to the north line of Jackson st., of the width of 80 feet, the dividing lines between blocks 120 and 141, and between blocks 121 and 140 of school section addition to Chicago, to be the centre of said street as extended or opened, being payment in full for all claims for damages to the same by reason of said proceedings	92	$36,000 00
Less am't paid on acc't March 22d, 1869		20,000 00
Balance due		$16,000 00

Comptroller.

Approved by the board.

A. H. BURLERY,
President.

(Endorsed:)
Paid six thousand dollars on acc't of this bill June 5th, 1869.
W. KIMBALL,
City Comp.
p'r CHASE.

Special assessment voucher.

No. , 26 . C. A. Gregory.

Warrant 562	$16,000 00
Paid on ac. June 5, '69	6,000 00

Comptroller of the city of Chicago pay the within amount to Dr. L.

D. Boone, as trustee and general agent of the Union Mutual Life Insurance Company of Maine, in full of principal due said company for lien on within land without recourse to me.

May 15, '69.

C. A. GREGORY.

Entered:

A. W. TUCKHAIN.
W.
Secretary.

93 Printed on the back of said voucher and unsigned is the following:

Received payment in full of all demands whatsoever, both in law and equity against the city to within date.

Further endorsed thereon is the following:

Without recourse on me.

LEVI D. BOONE,
Trustee, &c.

7th. A certain stipulation of date November 28, 1877, as follows:

DEPARTMENT OF PUBLIC WORKS,
Chicago, Nov. 27, 1877.

FRANCIS ADAMS, Esq.:

D'R SIR: The notice that the money was in the hands of the city treasurer for opening Dearborn st. was advertised in the Chicago Republican May 21, 1869.

Yours, truly,

H. J. JONES,
In Ch'g Sp'l Ass'ts.

Application for judgment for the city taxes levied in the year 1868 was entered against the lands levied on in the superior court of Chicago, at the February term of said court, in the year 1869, as appears from the tax-sale certificates now on file in this office, sale made March 20th, 1869.

F. M. BARRETT,
Ch'f Cl'k of Comptroller's Office.

94 The foregoing statements admitted in evidence subject to all objections as to relevancy.

F. ADAMS, *Sol'r.*
C. A. GREGORY, *Sol'r.*

CHARLES A. GREGORY, a witness for the complainant, being first duly sworn, testified as follows:

I am the person named in the pleadings, Charles A. Gregory; reside in Chicago, and am a lawyer by profession. I went into possession immediately on receiving the title to the land from Mr. Bruner and remained in the actual occupancy, by my tenants, of the property till the 14th of May, 1869, and from that time to this no one has ever had possession of that property except the City of Chicago. The city of Chicago took possession about the 1st day of June, 1869, for street purposes, and have occupied and used it for Dearborn street, and about May 14th,

1869, the city paid me for my right in the land twenty thousand dollars in cash.

Mr. ADAMS:

The same $20,000 that is credited on that voucher?

A. Yes; and the same is credited on this voucher which they then put into my hands and which I received from the proper officers of the city of Chicago. In order to get that money I exhibited to the city
95 an abstract of the title to the premises, showing who were the persons entitled to the property and various interests in it. I think I also made a quit-claim deed to the city of Chicago then and there, which my wife joined.

Q. (By Mr. ADAMS.) You think you did?

A. Well, I know I did. I did not consider it necessary, but they asked me. The city then, and ever since the corporate authorities have, had knowledge of what were the then rights of Dr. Boone as the trustee upon that land, and of the Union Mutual Life Insurance Company. It was a matter of so frequent and familiar negotiation between the parties so that they knew.

The COURT:

Q. That is, they knew of the existence of this trust deed?

A. They knew not only by its being of record, but they knew it in point of fact by consultation with all the parties. After receiving the $20,000, I handed this statement of the account, which we call the voucher, to Dr. Boone immediately. Dr. Boone demanded his share of the money of the city of Chicago, and they paid him, about 5th of June, $6,000 and endorsed the payment on this voucher.

Q. You endorsed it, did you say?

A. No; the city endorsed it on the voucher.

Q. You say you turned it over to Dr. Boone?

A. I did. The endorsement appears on the back of it.

Q. That is for the benefit of the claim, I suppose.

96 A. Yes, sir; afterwards, at the time of the purchase by Tebbetts from the Union Mutual Life Insurance Company, recited in the bill, Boone endorsed this voucher and turned it over to Mr. Tebbetts and received some $10,500; the exact amount I cannot state.

Mr. ADAMS:

Q. When you speak of an endorsement you mean the endorsement that is shown on the voucher now?

A. I mean the endorsement that appears on the paper.

Q. Has it got any date to it?

A. No; it was made a part of the condition of the payment of the money that Mr. Tebbetts should have all the rights against Bruner and the city which Boone or the Union Mutual Life Insurance Company had. The Bruner note was included in the purchase.

Q. In what purchase?

A. Of Tebbetts from the Union Mutual Life Insurance Company.

The COURT:

Q. That is, this $10,000 note?

A. Yes, sir; but it appeared upon the face of the note to have been cancelled by the sale—paid by the sale.

Mr. ADAMS:

Q. Where is that note?

A. Either Dr. Boone has it or the Union Mutual Life Insurance Company.

Mr. ADAMS. I shall object to any evidence about that.

97 The WITNESS (continuing). A suit was brought against the city of Chicago in November, 1873, an ejectment suit, in the superior court of Cook County, defended by the city, tried before the court.

Mr. ADAMS. I will admit that a suit in ejectment was brought in the superior court, in which the city recovered.

The WITNESS (continuing). And another in the United States court, as in the pleadings described.

Mr. ADAMS. Yes, sir.

The WITNESS. And with the result therein described as to both of said suits. As agent for Mr. Tebbetts after he made this purchase from the city of Chicago, repeatedly—I cannot state how many times, but a good many times—I have been to the comptroller of the city of Chicago to get the payment for this land; had an interview with a committee of the common council for the purpose. I made demands for the money in 1873, and every year since. I know that Dr. Boone in the summer of 1869, in June, 1869, and again prior to his foreclosing the trust deed, repeatedly demanded the balance of the money from the city of Chicago. I know it as a matter of fact from consultation with city officers and with Dr. Boone.

98 Cross-examination by Mr. ADAMS:

Q. How long have you been acquainted with the complainant Tebbetts?

A. I think in 1871 I first became acquainted with him.

Q. Is he of kin to you or related to you by marriage?

A. Not in the slightest manner. He is a merchant in the city of Boston, as I understand.

Q. Was he ever present during any of the negotiations for the purchase of the property from the insurance company?

A. He was not. I beg your pardon; he was, and went with me and was present with me at their headquarters, in the city of Boston.

Q. I mean as to the negotiations that were carried on with Dr. Boone in this city?

A. No, sir.

Q. He was not?

A. No, sir.

Q. Was this deed, quitclaim deed, from the insurance company to Tebbetts made of the day that it bears date?

A. I do not know about the fact; it is dated the 27th of December, 1872; it was executed, in point of fact, after the day it bears date, in order to take the place of this other instrument which I now hand you, which was executed on the day it bears date.

Q. This was executed on the 27th day of December, 1872?

A. Yes, sir. The reason the other was executed was to supply some omission in the acknowledgment or sealing of the deed, merely

99 to correct some supposed insufficiency or omission of the recital of the corporate seal; that is all.

Q. How long after the execution of the deed was it that this voucher came into your possession?

A. Well, it was given to me at the time when the money was paid; that was in 1872, and I don't remember the date. The voucher came into my possession in May, 1869, and was passed out of my possession.

Mr. ADAMS. I do not mean that; I mean from the insurance company; I want to prove by Mr. Stearns, but perhaps you will admit it, that this original agreement between Stearns and others and the Union Mutual Life Insurance Company was received by Mr. Stearns from Mr. Boone after the payment of a good deal of interest on it; that he got it out of Mr. Boone's possession.

Mr. GREGORY. I will admit that.

(The agreement referred to is dated May 13th, 1869.)

The city of Chicago, one of the defendants, introduced and read in evidence the following, to wit:

1st. A stipulation signed by Charles A. Gregory as solicitor for Tebbetts, complainant, and by Francis Adams, as solicitor for the city of Chicago, defendant, as follows:

In the United States circuit court, northern district of Illinois.

WILLIAM C. TEBBETTS
100 *vs.* } Bill.
THE CITY OF CHICAGO, LEVI D. BOONE, Charles A. Gregory, et al.

It is hereby stipulated and agreed in the above-entitled cause—

1st. That a certain agreement of date May 13, 1869, by and between Marcus C. Stearns, Henry H. Honoré, William C. Butler, Henry M. Shepard, George A. Bigelow, and Joseph E. DeKoren, parties of the first part, and the Union Mutual Life Insurance Company of Maine, of the second part, and certain receipts for interests endorsed thereon, shall be admitted in evidence on the hearing of said cause, proof of the execution of said agreement by the parties subscribing thereto being hereby waived.

2nd. That the board of public works of the city of Chicago and the said city had knowledge of the said agreement after the execution thereof, and the said city, but for the knowledge of said agreement, would not then, to wit, June 1, 1869, have taken possession of the premises described in said bill of complaint.

3. That Charles A. Gregory, one of the defendants to said bill of complaint, heretofore, to wit, December 12, 1876, filed a petition in bankruptcy in the district court of the United States in and for the northern district of Illinois; that such proceedings were had in the matter
101 of said petition that, to wit, December 12, 1876, the said Charles A. Gregory was adjudged a bankrupt; that, to wit, Jan. 16, 1877, one R. E. Jenkins was appointed the said Gregory's assignee in bankruptcy, and accepted said appointment and qualified as such assignee, and that at said last-mentioned date the said Charles A. Gregory made an assignment to the said assignee, in conformity with the law in such case made and provided, of his real and personal estate, including all his property of whatsoever kind of which he was possessed or in which he was interested or entitled to have on the 12th day of December, 1876; that the indebtedness of said Gregory, as shown by his schedule filed in said bankruptcy proceedings, amounted to about two hundred and ninety-seven thousand ($297,000) dollars, and more than ten thousand (10,000) dollars of proved claims remains unpaid; also that a certificate of final discharge was issued to said Gregory in said proceedings, to wit, April 19, 1877. The files and record in the matter of the said petition in bankruptcy may be produced and refer'ed to by any of the parties to said cause or by the court on the hearing of said cause.

4th. That the said city of Chicago has not paid (out of its treasury) on account of the said compensation or damages to exceed twenty-six thousand (26,000) dollars.

It is further agreed that in the said agreement purporting to
102 be between Stearns and others and the said Union Mutual Life Insurance Company of Maine, lot four (4) was therein inserted by mistake for lot one (1), the latter not being intended.

Nov. 27th, 1877.

CHARLES A. GREGORY,
Solicitor for Tebbetts.
FRANCIS ADAMS,
Sol'r for City of Chicago.

2d. A certain agreement of date May 13, 1869, between Marcus C. Stearns and others of the first part and the Union Mutual Life Insurance Company of Maine, of the second part, as follows:

This agreement, made and entered into this thirteenth day of May, A. D. 1869, by and between Marcus C. Stearns, Henry H. Honoré, Eugene S. Pike, Phineas L. Underwood, Charles H. Ham, William M. Butler, Henry M. Shepard, George A. Bigelow, and Joseph E. DeHaven, of Chicago, in the county of Cook, and State of Illinois, parties of the first part, and the Union Mutual Life Insurance Company of Maine, of the second part, witnesses:

That whereas by trust deed dated July 10, 1866, and recorded in the recorder's office of said county of Cook July 25, 1866, in book 333, at page 603, one James D. Bruner conveyed the following described land, to wit, the east thirty-six (36) feet of the west forty (40) feet of lot four (4), in block one hundred and forty-one (141), in school section ad-
103 dition to Chicago, in Cook County, Illinois, or however otherwise the same may be described, unto one Levi D. Boone, in trust, to secure the payment unto said insurance company of said Bruner's note of even date with said trust deed for ten thousand dollars with interest at eight per cent. per annum, payable semi-annually, said note payable in one year after the date thereof and still remaining unpaid; and whereas by another trust deed dated June 12, 1867, and recorded in said recorder's office June 14, 1867, in book 388, at page 474, said Bruner further conveyed the premises aforesaid unto said Boone in trust to secure the payment to said insurance company of said Bruner's note of even date with said last mentioned trust deed for eight thousand dollars, payable with semi-annual interest at eight per cent. per annum, two (2) years after date, on which said note the principal sum of six thousand dollars only remains unpaid, so that said premises are now subject to the lien of said two trust deeds for the principal sum of sixteen thousand dollars.

And whereas the city of Chicago has under the provisions of its charter condemned said land for the extension of Dearborn street south from Monroe street to Jackson street, by virtue whereof said insurance company as the holder of said notes has become by law entitled
104 to have and receive said money so soon as the same shall be paid into the treasury of the city of Chicago and before said city shall take possession of or occupy said land; and whereas the city of Chicago at the time of making this obligation has not paid to said insurance company said sum of money and cannot conveniently do so, but has issued a voucher for the sum of sixteen thousand dollars on account of the condemnation of said land, which has been assigned to said insurance company as collateral security for the payment of said notes, and whereas said city may not be able or willing or liable to pay interest on said money, and whereas the parties of the first part have a large pecuniary interest in having said Dearborn street immediately opened, and said insurance company and said Boone have at the special request of said parties

of the first part consented to take no legal steps at present to prevent said city from occupying said land, provided the payment of the interest on said notes is guaranteed to them by the parties of the first part (it being however distinctly understood that said Boone and said insurance company do not by said consent waive or abandon any right they may have on said notes against the maker thereof or any right of suit against the said city for the recovery of said money, or any right of entry or possession of said land).

105 And whereas the respective proportions of liability for the payment of interest as aforesaid resting upon said parties of the first part has been and is agreed among them to be as follows, to wit, that said Stearns is to pay sixty (60) equal three hundred and twenty-second (322d) parts of said interest money, and that the said Pike is to pay forty-seven and one-half (47½) equal three hundred and twenty-second (322d) parts of said interest money, and that the said Honoré is to pay forty-six (46) equal three hundred and twenty-second (322d) parts of said interest money, and that the said Underwood is to pay fifteen (15) equal three hundred and twenty-second (322d) parts of said interest money, and that the said Ham is to pay seventeen and one-half (17½) equal three hundred and twenty-second (322d) parts of said interest money, and that the said Butler is to pay ten (10) equal three hundred and twenty-second (322d) parts of said interest money, and that the said Shepard is to pay thirty-four (34) equal three hundred and twenty-second (322d) parts of said interest money, and that the said Bigelow is to pay fifty-two (52) equal three hundred and twenty-second (322d) parts of said interest money, and that the said DeHaven is to pay forty (40) equal three hundred and twenty-second (322d) parts of said interest money,

106 the whole amount of interest, whatever the same may be, being considered to be divided into three hundred and twenty-two (322) equal parts:

Now, therefore, in consideration of the premises and the consent of said insurance company to defer for a time the enforcement of the collection of said notes and moneys and to take no legal steps at present to prevent said city from occupying said land, the said Stearns doth hereby agree with said insurance company to pay to said insurance company, its assigns, agent or attorney, on every 10th day of July and on every 10th day of January ensuing the date hereof, so long as any part of said principal sum of sixteen thousand dollars shall remain unpaid, interest on the said sum of sixteen thousand dollars, or on so much of the same as from time to time remains unpaid, at and after the rate of eight per cent. per annum, and said insurance company on its part shall be considered to have received a payment on said notes from the city of Chicago as often and as fast as there shall from time to time have accumulated in the treasury of said city a sum of money amounting to five thousand (5,000) dollars, which shall be applicable and payable upon said vouchers, provided said city shall have notified said insurance company in writing that said money is ready for payment, and from the time of such accumulation and notice interest as

107 against any of the parties to this agreement shall cease on such sums so accumulated and proffered to be paid, it being the intention hereof to require said insurance company to receive payment of said city so often and as fast as there shall be funds amounting to five thousand (5,000) dollars applicable to the payment of said voucher, and said insurance company shall have had notice thereof as aforesaid.

And the said Pike, on his part, doth agree with the said insurance company to pay to said company his share of said interest, which share

it is hereby agreed is forty-seven and one-half equal three hundred and twenty-second parts of said interest-money, at the same time and in the same manner and on the same terms as is above agreed to by said Stearns.

And the said Honore, on his part, doth agree with said insurance company to pay to said insurance company his share of said interest, which share is hereby agreed is forty-six equal three hundred and twenty-second part of said interest money at the time and in the manner and on the terms last above referred to.

And the said Underwood, on his part, doth agree with said insurance company to pay to said company his share of said interest, which share it is hereby agreed is fifteen equal three hundred and twenty-second parts of said interest money, at the time and in the manner and on the terms last above referred to.

108 And the said Ham, on his part, doth agree with said insurance company to pay to said insurance company his share of said interest, which share it is hereby agreed is seventeen and one-half equal three hundred and twenty-second parts of said interest-money, at the time and in the manner and on the terms last above referred to.

And the said Butler, on his part, doth agree with said insurance company to pay to said company his share of said interest, which it is hereby agreed is ten equal three hundred and twenty-second parts of said interest money, at the time and in the manner and on the terms last above referred to.

And the said Shepard, on his part, doth hereby agree with said insurance company to pay to said company his share of said interest, which share it is hereby agreed is thirty-four equal three hundred and twenty-second parts of said interest-money, at the time and in the manner and on the terms last above referred to.

And the said Bigelow, on his part, doth agree with said insurance company to pay to said company his share of said interest, which share it is hereby agreed is fifty-two equal three hundred and twenty-second parts of said interest-money, at the time and in the manner and on the terms last above referred to.

And the said DeHaven, on his part, doth agree with said insurance company to pay to said company his share of said interest, which
109 share it is hereby agreed is forty equal three hundred and twenty-second parts of said interest-money, at the time and in the manner and on the terms last above referred to.

It is, however, understood that any moneys which said city may at any time pay to said company as and for interest on said voucher shall be credited as so much interest paid on said notes, and shall relieve the said parties of the first part from their aforesaid engagement to pay such interest or be refunded to them upon the final payment of the principal of said notes to the extent that the city shall pay the same.

Witness the hands and seals of the said parties of the first part the day and year first above written.

M. C. STEARNS. [SEAL.]
H. H. HONORE. [SEAL.]
EUGENE S. PIKE. [SEAL.]
P. L. UNDERWOOD. [SEAL.]
CHARLES H. HAM. [SEAL.]
WM. M. BUTLER. [SEAL.]
H. M. SHEPARD. [SEAL.]
GEO. A. BIGELOW. [SEAL.]
JOSEPH E. DeHAVEN. [SEAL.]

[Internal revenue stamp, 50.]

To which said agreement was attached the following receipt, to wit:

$820.] CHICAGO, *July 12th*, 1872.

Received of M. C. Stearns eight hundred and twenty dollars,
110 being the amount of interest due the Union Mutual Life Insurance Company on July 10, '72, loan of J. D. Bruner, No. 99. Paid by M. C. Stearns to—

L. D. BOONE, *Ag't, Att'y in fact.*

$800 of the above being for one year's interest, and twenty for deferred interest on the half yearly payment due Jan'y 10, '72.

LEVI D. BOONE, a witness called by the defendant, The City of Chicago, being first duly sworn, testified as follows:

Direct examination by Mr. ADAMS:

Q. Doctor, state whether you were agent for the Union Mutual Life Insurance Company of Maine, in the year 1869, about May 13th.

A. I was.

Q. I believe you have continued to be their agent ever since, hav'n't you?

A. No, sir; not the last year.

Q. Till last year you remained their agent. Do you recollect a sale by the company to William C. Tebbetts of certain land which the company had purchased under a trust deed made from Bruner to you, to secure the payment of money?

A. Yes, sir.

Q. Who negotiated that sale for Tebbetts?

A. I think, Mr. Gregory.

Q. Do you recollect the assignment to the insurance company, or to you, by Gregory, of a voucher which was for $36,000 originally,
111 but on which $20,000 had been paid? Do you recollect that? (Handing witness paper.)

A. Yes, sir; I remember that.

Q. What was the object of taking that? State whether or not it was taken as security collateral to the principal security of the trust deed for the payment of this money, from Bruner.

A. It was so taken, sir.

Q. The company purchased the land, didn't they, at the trustee's sale?

A. Yes, sir.

Q. How much did they bid? Did they bid the amount due on the note—the balance due?

A. That is my recollection, sir; that they bid the amount due.

Q. And this, you say, was only held by you as security collateral to the trust deed security?

A. Yes, sir.

Q. Now, when you sold, you say you negotiated the sale to Tebbetts; then Mr. Gregory negotiated the sale with you?

A. That is the way I recollect it.

Q. What did you sell to Gregory at that time; the land?

A. The land.

Q. Did you sell anything more than the land?

A. No, sir.

Q. Did you consider, as the agent of the company, that you had any

interest whatever in that voucher after the purchase of the land by the company at the trustee's sale?

(Objected to.)

112 The COURT. He can state what he knows about it. State the fact.

A. As a fact I know that I did return this voucher to Mr. Gregory after the sale; I think at the time of the sale of the property to Mr. Tebbetts.

Q. You returned that voucher to Mr. Gregory?

A. Yes, sir.

Mr. ADAMS:

Q. Why did you give the voucher to Mr. Gregory?

A. Well, I supposed he was entitled to it, of course, or I should not have given it to him.

Q. You supposed that Gregory, personally, was entitled to it?

A. Yes, sir.

Q. On the ground that he had assigned it to you as collateral security for that deed?

A. Yes, sir.

Cross-examination by Mr. GREGORY:

Q. Dr. Boone, at the time I negotiated the purchase for Mr. Tebbetts of you, state whether as a matter of fact that, in the conversations taking place at the time, it was not stated that we could not be certain at that moment—that we did not know as a matter of law whether we were purchasing the right to the damages or purchasing the land, and it was distinctly made a consideration of the payment of the money that Mr. Tebbetts should have the voucher, the Bruner note,

113 all the legal and equitable interest that Boone or the Union Mutual Life Insurance Company had in either? Was not that a part of the conversation? Was not that the consideration for which the money was paid by Mr. Tebbetts?

(Objected to.)

Q. State whether anything was said on that subject.

The COURT. State what was said.

A. It is impossible for me to state what was said in conversation as long ago as that, for it would not be impressed upon my mind. I could not give the conversation. I recollect that there was conversation on that subject, and something to the effect of what Mr. Gregory alludes to, but just what the conversation was I cannot remember. I know what my own feelings were at the time in relation to the whole thing.

Mr. GREGORY:

Q. Doctor, will you please to state your expressed intentions at the time of that negotiation?

Mr. ADAMS. What you said, in other words.

The COURT. Yes; you can state what you said, if you recollect.

A. I don't know what I said.

Q. Well, did you know that Mr. Gregory was acting for Mr. Tebbetts at that time?

A. Only by his representations.

Mr. ADAMS:

Q. That is, in the purchase of the land?

114 A. Yes, sir.

A. Yes, sir.
Q. A number of times?
A. Asked the comptroller and city attorney.
Q. Well, you received a part of the payment in June, 1869?
A. I received $6,000.

Mr. ADAMS:

Q. You delivered the deed to Mr. Gregory, did you?
A. Yes, sir.
Q. That is the Tebbetts deed you delivered to Mr. Gregory?
A. Yes, sir.
Q. Now, have you any recollection whether the deed and the voucher were delivered at the same time or at different times?
A. I think they were delivered at the same time.
Q. You think so?
A. Yes, sir.
Q. Do you recollect anything about that?
A. No, sir; not very distinctly, except that I know that the whole thing was wound up.
Q. Who paid you this money? Who actually made the payment for the land?
A. Mr. Gregory.

119 Q. After the purchase by the company at the trustees' sale of this land, and between that time and the time of the sale to Tebbetts, did the company ever make any demand upon the city for the damages, or did you as the agent of the company?
A. After the sale?
Q. After the sale.
A. No; never did.
Q. Now, I understand you to say in your examination in chief, that when you were selling to Tebbetts you understood you were selling him the land and nothing else?
A. I said I understood that I was selling him the land.
Q. Did you understand that you were selling Tebbetts anything else except the land?
A. I said that I did not remember distinctly on that subject. There was some conversation about it.

The COURT:

Q. Well, did you know—you did know, of course—that the land had been condemned; had been assessed?
A. Yes, sir.
Q. Condemned for street purposes?
A. Yes, sir.
Q. And that this certificate was the consideration of the condemnation? Didn't you know that was the money that was to be paid?
A. Yes, sir; that was the understanding.

Mr. GREGORY:

120 Q. Now, I will refresh your recollection. Do you not recollect that you said to Mr. Gregory, the agent of Mr. Tebbetts, that Tebbetts would either get the land or the money; he was perfectly safe in making the purchase? Can you not now go back to the time and recall those conversations? Didn't you say that Tebbetts would either get the money or the land; he was perfectly safe in making the purchase, or words to that effect?
A. No, sir; I cannot remember; I cannot remember what was said;

that is the fact about it. I cannot remember what I said or what Mr. Gregory said, as I said before. I can remember distinctly what my feelings and impressions were with reference to getting the insurance company's pay and feeling satisfied on that score.

Q. Did you or did you not state that you sold all your rights, all the right that you or the Union Mutual Life Insurance Company had in law or equity to the condemnation money or the land, whichever, might turn out to be the legal status of it?

A. My impression is that I did, Mr. Gregory, but I cannot say positive about.

Q. And that was the consideration given by you for the $10,000 and upwards which you received from Tebbetts?

A. Yes, sir.

Mr. ADAMS:

121 Q. Doctor, you recollect delivering up that agreement between Mark Stearns and Honoré and these private parties running to the insurance company? Do you recollect giving it back to Stearns?

A. I don't recollect.

Q. You had it, though?

A. Yes, sir.

Mr. GREGORY:

Q. Did you ever have possession of that ground mentioned in the pleadings, or did the Union Mutual Life Insurance Company, and did you ever give consent to the city of Chicago to take possession of it in any way?

(Objected to. Received subject to objection.)

A. Whether I had possession of it or the Union Mutual Life Insurance Company had possession of it would be a legal question.

Q. Were you in possession of it at any time, or occupancy?

A. No.

Q. Did you consent to the city taking possession of it?

A. No, sir.

Mr. ADAMS:

Q. You knew of this agreement between Stearns and the company?

A. Yes, sir.

Q. And the agreement was delivered to you?

A. Yes, sir.

122 Q. And you subsequently drew $6,000 on that voucher, didn't you?

A. Yes, sir.

Q. Did you subsequently receive some interest from these parties?

A. Yes, sir.

Q. For instance, there is a receipt for interest (showing witness paper); you received that interest, did you?

A. Yes, sir.

The COURT. How much was that?

Mr. ADAMS. $820.

Q. You received that interest on the ground and in accordance with that agreement?

A. Let me see the receipt. I know I received interest.

Q. Look at that receipt. That is your signature?

A. That is my clerk's signature, and he received that interest, no doubt.

Q. What is the date of that receipt?
A. July 5th, 1872.
Q. Interest paid by Mark Stearns, one of the parties to that agreement?
A. Yes, sir.

It was agreed that the court might take judicial cognizance of the present and all former charters of the city of Chicago and of the charter of the Union Mutual Life Insurance Company of Maine.

123 I further certify that the above and foregoing is all the evidence introduced in said cause or on the hearing of said cause.

In witness whereof I hereunto set my hand and seal this 11 day of December, A. D. 1877.

[SEAL.] THOMAS DRUMMOND.

(Endorsed:) Filed December 11, 1877. Wm. H. Bradley, clerk.

124 And afterwards, to wit, on the 27th day of December, A. D. 1877, said defendant, by its solicitor, filed in said clerk's office its appeal bond in said entitled cause, which said bond is in the words and figures following, to wit:

Appeal bond.

Know all men by these presents that the city of Chicago, a municipal corporation organized and existing under the laws of the State of Illinois, of the county of Cook and State of Illinois, as principal, and D. K. Pearson, M. C. Stearns, John Mattocks, and A. G. Throop, of the same county and State, as sureties, are held and firmly bound unto William C. Tebbetts in the sum of twenty thousand dollars ($20,000) of lawful money of the United States, for the payment of which sum, well and truly to be made, the said city of Chicago binds itself and the said D. K. Pearsons, M. C. Stearns, John Mattocks, and A. G. Throop bind themselves, their heirs, executors, and administrators, jointly and severally, firmly by these presents. In witness whereof the said city of Chicago has caused these presents to be signed by its mayor and attested by its clerk and its corporate seal to be hereto attached, and the said D. K. Pearsons, M. C. Stearns, John Mattocks, and A. G. Throop have hereunto set their hands and seals, respectively, this day of December, A. D. 1877.

125 The conditions of the above obligation are such that whereas the said William C. Tebbetts did, on the eleventh day of December, A. D. 1877, in the circuit court of the United States for the northern district of Illinois, and of the October term, A. D. 1877, of said court, recover a decree against the above bounden the city of Chicago for the sum of thirteen thousand nine hundred and fifty-three dollars and thirty-three cents ($13,953.33), and costs of suit, in a certain cause heretofore pending in said court on the chancery side thereof, wherein the said William C. Tebbetts was complainant, and the said city of Chicago and others were defendants, from which said decree the said city of Chicago has prayed for and obtained an appeal to the Supreme Court of the United States:

Now, therefore, if the above bounden city of Chicago shall prosecute its said appeal with effect, and moreover pay the said decree and all interest, costs and damages accrued or to accrue thereon by reason of said appeal, in case the said decree is affirmed by said Supreme Court,

then the above obligation to be void, otherwise to remain in full force and virtue.

[SEAL.] M. HEATH,
Mayor of the City of Chicago.

126 DANIEL K. PEARSONS. [SEAL.]
MARCUS C. STEARNS. [SEAL.]
JOHN MATTOCKS. [SEAL.]
AMOS G. THROOP. [SEAL.]

Attest:
CASPAR BUTZ,
City Clerk.

Approved:
THOMAS DRUMMOND.

(Endorsed:) Filed Dec. 27, 1877. Wm. H. Bradley, cl'k.

127 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein William C. Tebbetts is the complainant and the city of Chicago et al. are the defendants, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 30th day of September, A. D. 1878, and of our Independence the 103d year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Indorsed:) United States Supreme Ct. The City of Chicago, impl'd, &c., appellant, vs. Wm. C. Tebbetts, appellee. Record. Joseph F. Bonfield, sol'r for appellant.

(Indorsement on cover:) No. 299. The City of Chicago, appellant, vs. William C. Tebbetts. N. Illinois C. C. U. S. Filed 19th October, 1878.

O

IN THE

SUPREME COURT OF UNITED STATES,

THE CITY OF CHICAGO, *Appellant*,

vs.

WILLIAM C. TEBBETTS, *Appellee*.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

ARGUMENT FOR APPELLANT.

FRANCIS ADAMS,
Corporation Counsel, for Appellant.

WM. C. GOUDY,
Of Counsel.

BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET.

IN THE

SUPREME COURT OF UNITED STATES,

THE CITY OF CHICAGO, *Appellant*,

vs.

WILLIAM C. TEBBETTS, *Appellee.*

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

MAY IT PLEASE THE COURT:

The appellee claiming to be the equitable owner of a balance of $10,000, on account of compensation or damages awarded in certain condemnation proceedings instituted by the city of Chicago, in respect of the east 36 feet of the west 40 feet of lot 1, block 41, school section addition to Chicago, which was taken by the city, for the opening or extension of a street, filed his bill of complaint in the court below, praying a decree for that amount, with interest from May 14, 1869. The court decreed the payment of $10,000, with interest at the rate of six per cent. per annum, from January 1, 1870, and the city appealed.

Statement of Facts.

It is admitted by the answer that the common council of the city, May 25, 1868, passed an ordinance for the extension of Dearborn street, that under and by virtue of the ordinance, and the city charter, a special assessment was made, showing the damages and benefits which would accrue to private property by reason of the improvement; that it was necessary to take for the improvement the premises in question; that, by the assessment, damages were assessed in respect of said premises to the amount of $36,000, and that, to wit: June 1, 1869, the city entered and took possession of the premises. (Rec., pp. 27, 29.)

The date of entry by the city also appears by appellee's evidence. (Rec., p. 94.)

The bill admits payment of $26,000, on account of the compensation awarded. (Rec., p. 11.)

It is averred in the bill, and admitted in the answer, that the assessment was confirmed by the common council, October 5, 1868. (Rec., p. 27.)

The following facts appear from the evidence, viz:

Charles A. Gregory was the owner of the premises, at the time of the confirmation of the assessment, subject to two trust deeds made by James D. Bruner, Gregory's grantor, to Levi D. Boone, as trustee for the Union Mutual Life Insurance Company of Maine, one of date June 12, 1867, to secure payment of a promissory note for $8,000, and interest, payable two years after the date thereof, which note, the bill avers, was paid. (Rec., p. 11.) And one of date July 10, 1866, to secure payment to said insurance company, of a promissory note of said date, for the sum of $10,000, payable one year after the date thereof, with interest at eight per cent. per annum. (Rec., p. 66.)

May 14, 1869, a voucher was issued by the city to C. A. Gregory for the amount of the damages awarded in the condemnation proceeding, viz: $36,000, less $20,000, paid March 22, 1869; and Gregory, May 18, 1869, assigned this voucher, showing a balance due of $16,000 to Levi D. Boone, as trustee of the Union Mutual Life Insurance Company of Maine, and authorized the city comptroller to pay the balance due to Boone. (Rec., p. 92.)

The city paid Boone $6,000 on the voucher June 5, 1879. (Rec., pp. 92, 95, 118.) This, with $2,000 and interest, which had been previously paid, fully paid up the $8,000 note, secured by the trust deed of July 12, 1867. (Rec., pp. 5, 11.)

Marcus C. Stearns, and nine other persons, owners of property, and interested in the opening of the street, entered into an agreement with the Union Mutual Life Insurance Company of Maine, of date May 13, 1869, which recites the execution of the trust deeds above mentioned, and that the condemned premises were subject to a lien by reason of the trust deeds, to the amount of $16,000 principal; that the city had condemned the premises for the extenson of Dearborn street; that the holder of the notes secured by the trust deeds was entitled to receive the money as soon as the sum should be paid into the city treasury, and before the city could take possession of the condemned premises; that the city had not paid the money to the insurance company, and could not conveniently do so, but had issued a voucher for $16,000, which had been assigned to the insurance company, as collateral security for the payment of the promissory notes; that the city might not be able or willing, or liable to pay interest on said money; that the parties of the first part (Marcus Stearns and others) had a large pecuniary interest in having Dearborn street opened immediately, and that

the insurance company and Boone had, at the special instance and request of said first parties, consented to take no legal steps at present to prevent the city from occupying the land, provided the payment of the interest on the notes should be guaranteed to them by the said first parties, it being understood that Boone and the insurance company waived no rights, &c.

The agreement then recites "the respective proportions "of liability for the payment of interest, as aforesaid, resting "upon said parties of the first part, as has been and is "agreed among them, as follows, to wit, that said Stearns "is to pay sixty equal three hundred and twenty-second "parts of said interest money," and so on, stating the proportion of interest which each one of the first parties to the agreement is to pay. The agreement then proceeds as follows:

"Now, therefore, in consideration of the premises and "the consent of said insurance company to defer, for a time, "the enforcement of the collection of said notes and moneys "and to take no legal steps at present to prevent said city "from occupying said land, the said Stearns doth hereby "agree with said insurance company to pay to said insu- "rance company, its assigns, agent or attorney, on every "10th day of July and every 10th day of January ensuing "the date hereof, so long as any part of said principal sum "of sixteen thousand dollars shall remain unpaid, interest "on said sum of sixteen thousand dollars, or on so much "of the same as from time to time remains unpaid, at and "after the rate of eight per cent. per annum, and said in- "surance company, on its part, shall be considered to have "received a payment on said notes from the city of Chica- "go, as often and as fast as there shall from time to time "have accumulated in the treasury of said city a sum of "money amounting to five thousand (5,000) dollars, which "shall be applicable and payable upon said vouchers, pro-

"vided said city shall have notified said insurance company "in writing, that said money is ready for payment, and from "the time of such accumulation and notice interest as "against any of the parties to this agreement shall cease "on such sums so accumulated and proffered to be paid, it "being the intention hereof to require said insurance com- "pany to receive payment of said city so often and as fast "as there shall be funds amounting to five thousand (5,000) "dollars applicable to the payment of said voucher, and "said insurance company shall have had notice thereof as "aforesaid."

Then follows an express agreement on the part of each one of the parties of the first part to pay his proportion of the interest. (Rec., pp., 102–109.)

To the agreement was attached the following receipt:

"Received of M. C. Stearns, eight hundred and twenty "dollars, being the amount of interest due the Union Mu- "tual Life Insurance Company, on July 10, 1872, loan of J. "D. Bruner, No. 99, paid by M. C. Stearns, to L. D. "Boone, Agt. Att'y in fact."

Boone testified that the agreement was delivered to him, and that he received the amount mentioned in the receipt. (Rec. p. 122.)

No more interest appears to have been paid by the parties to the agreement.

It is admitted by stipulation filed in the cause and signed by counsel, "that the board of public work of the city of "Chicago, and the said city had knowledge of the said "agreement, after the execution thereof, and the said city, "but for the knowledge of said agreement, would not then, "to wit, June 1, 1869, have taken possession of the prem- "ises described in said bill of complaint;" also that the city had only paid $26,000, on account of the damages awarded. (Rec., pp. 100, 101.)

The trust deed to Boone to secure the payment to the insurance company of the $10,000 note and interest, contained a power of sale, in default of the payment of the note and interest, and the note not having been paid by the maker thereof, and the city not having paid the balance of $10,000, remaining due on account of the compensation awarded for the condemned premises, Boone, the trustee, sold the premises at public auction, in pursuance of the power contained in the trust deed to the Mutual Life Insurance Company of Maine, for the *expressed* consideration of $5,000, and Aug. 16, 1872 executed to the company a deed of the premises in pursuance of such sale. (Rec., pp. 74–82.) The bill avers and Boone testifies that the company bid at the sale, the amount then due on the note, and that he cancelled the note. (Rec., pp. 14, 110, 116.)

And Gregory, Tebbetts' agent, testifies that "it ap-"peared on the face of the note to have been cancelled by "the sale, paid by the sale." (Rec., p 96.)

Dec. 27, 1872, the insurance company, by deed of that date conveyed the premises to William C. Tebbetts, the complainant, for the expressed consideration of $22,000. (Rec., p. 84.) Gregory says Tebbetts only paid about $10,500. (Rec., p. 96.)

Assignment of Errors.

I.

The court erred in decreeing that William C. Tebbetts, the complainant, was entitled to the balance of the principal sum awarded as compensation for the condemned premises.

II.

The court erred in allowing interest upon the balance of the principal sum awarded as compensation for the condemned premises, and entering a decree for the payment of such interest.

Points and Argument.

I.

William C. Tebbetts, the appellee, has never had any title, legal or equitable, to any part of the compensation awarded for the condemned premises.

The only interest claimed by appellee is that which he obtained from the Union Mutual Life Insurance Company of Maine, by deed of date Dec. 27, 1872. (Rec., p. 84.)

It will be pertinent, therefore, to enquire what interest, if any, the insurance company had in the compensation awarded, at the date of the deed to appellee, and, also, what did the insurance company convey to appellee?

In this connection it will be necessary to refer to some of the provisions of the charter, on the subject of special assessments, in cases in which it is necessary to take land for a public improvement. It is stipulated that the court may "take judicial cognizance of the present and all for-" mer charters of the city of Chicago." (Rec., p. 122.)

The charter under which the assessment was made contained the following provisions:

Sec. 13. "When completed, the commissioners shall " sign and file the assessment roll in the office of the city " clerk, and a duplicate thereof in the office of the board " of public works. Notice shall be given by said com- " missioners, by six days' publication in the corporation " newspaper, of the filing of such assessment roll in the " clerk's office, and that at the next regular meeting of the " common council, to be held after the expiration of such " publication, they will apply to the common council for a " confirmation of said assessment. Objections to said

" assessment may be heard before the common council,
" but all parties objecting shall file their objections, in
" writing, in the office of the city clerk, at least one day
" prior to such meeting of the council. Should no quo-
" rum be present at such meeting, the matter shall stand
" postponed to the next regular meeting of the council
" when there shall be a quorum. The council shall have
" power to adjourn such hearing from time to time, and
" shall have power, in their discretion, to revise and cor-
" rect the assessment, and confirm or annul the same, and
" direct a new assessment to be made. Said assessment,
" when confirmed by the common council, shall be final
" and conclusive upon all parties interested therein, except
" as hereinafter provided; and when said assessment is
" confirmed and no appeal is taken, as herein provided, a
" warrant shall issue for the collection of the same, signed
" by the mayor and city clerk. If said assessment shall
" be annulled by the common council or set aside by the
" court, the commissioners of the board of public works
" shall proceed to make a new assessment, and return the
" same in like manner, and give like notice as herein re-
" quired in relation to the first; and all parties in interest
" shall have the like rights, and the common council shall
" perform like duties and have like powers in relation to
" any subsequent determination, as are herein given in
" relation to the first."

Priv. Laws Ill. 1863, p. 86.

Sec. 14. " Any person whose property has been ap-
" propriated and who has filed objections to said assess-
" ment, as hereinbefore provided, shall have the right, at
" any time within ten days after the confirmation of
" the same by the common council, and not after that
" time, having first given notice of his or her intention so
" to do to the counsel, to the corporation or city attorney,

" specifying in such notice the court to which the appeal is " to be taken, to pray an appeal, to any court of general " jurisdiction in Cook County, from the order of the com- " mon council confirming such assessment, upon filing a " bond to said city, approved by the judge or judges of " the court to which the appeal is taken, conditioned to " save the city harmless from all damages caused by the " taking of such appeal. In case of appeal, a copy of the as- " sessment roll, as confirmed by the common council, and " of the objections to the final order confirming the same, " shall be filed in the office of the clerk of the court to " which such appeal shall be taken, and the cause shall be " docketed by such clerk in the name of the person taking " such appeal against the city of Chicago, as an 'appeal " 'from assessment.' The said cause shall be then at issue, " and shall have the preference in order of trial over all " civil causes pending in said court. Such appeal shall be " tried by the court, and on such trial the only questions to " be passed upon shall be whether the common council " had jurisdiction in the case, and whether the valuation of " the property, specified in the objection, is a fair valua- " tion, and the assessment, so far as it effects said property " is a fair and impartial assessment. The judgment of the " court shall be either to confirm or annul the assessment, " from which judgment, no appeal or writ of error shall " lie." *Ib.* p. 47.

Sec. 15. " When any such assessment shall have " been confirmed by the common council, and no appeal " have been taken therefrom, or, if an appeal shall have " been taken, when judgment to confirm the assessment " shall have been rendered thereon, the same shall be a " lawful and sufficient condemnation of the land or prop- " erty ordered to be appropriated. The board of public " works shall thereupon cause to be paid to the owner of " such property or to his agent, the amount of damages,

"over and above all benefits, which may have been "awarded therefor, as soon as a sufficient amount of as- "sessment shall have been collected for that purpose; but "the claimant shall in all cases, furnish an abstract of title, "showing himself entitled to such damages, before the same "shall be paid. If, in any case, there shall be any doubt "as to who is entitled to the damage for land taken, the "city may require of the claimant a bond, with good and "sufficient sureties, to hold said city harmless from "all loss, costs and expenses, in case any other person "should claim damages. In all cases, the title to land "taken and condemned in manner aforesaid, shall be vested "completely in the city, in fee simple." *Ib.* p. 88.

SEC. 16. "As soon as the money is collected, and ready "in the hands of the treasurer to be be paid over to par- "ties entitled to damages for property condemned, ten "days' notice thereof shall be given by the board of "public works in the corporotion newspaper; and the "city may then, and not before then, enter upon, take "possession of and appropriate the property con- "demned." (*Ib.* 88.)

SEC. 17. "Whenever the damages awarded to the "owner for any property condemned by said city for pub- "lic use, shall have been paid to such owner or his agent, "or when sufficient money for that purpose shall be "in the hands of the city treasurer ready to be paid "over to such owner, and ten days' notice thereof "shall have been given in the corporation newspaper, the "city may enter upon and appropriate such property to "the use for which the same was condemned." (Priv. Laws Ills., 1865, p. .)

The sections above quoted are sections 14 to 18, inclusive, of Chap. 7 of the Revised Laws and Ordinances, 1873, of the city of Chicago, pp. 44–46, a copy of which I

have deposited with the clerk for the convenience of the court.

It will appear from section 15, *supra*, that, upon the confirmation of the assessment, the title to the premises condemned vested absolutely in the city.

At the date of the confirmation of the assessment, to wit, October 15, 1868, Charles A. Gregory was the owner in fee, subject to the encumbrance created by the trust deed from Bruner, his grantor, to Boone.

In equity, the compensation awarded belonged to Gregory, the owner in fee, and the Union Mutual Life Insurance Company of Maine, the *cestui que trust* in the trust deed, in the proportions of their respective interests. This was the understanding of Gregory and the company. (Rec., p. 95.)

The city paid Gregory, the former owner in fee, $20,000, March 22, 1869, on account of the compensation awarded, (Rec., pp. 11, 53, 92.) This left a balance of $16,000 of the compensation unpaid.

The amount due, in respect of the incumbrances created by the trust deed, May 14, 1869, was $16,000. (Rec., p. 103.) The balance of the compensation, therefore, over and above the amount paid Gregory, viz., $16,000, belonged in equity to the insurance company. This fact Gregory recognized by assigning to Boone, trustee and agent for the company, the voucher showing an unpaid balance of $16,000. (Rec., pp. 11, 92.)

Boone, as such trustee, received from the city on the voucher so assigned to him, the sum of $6,000, June 5, 1869. (Rec., pp. 11, 92; 118.)

Not only did Boone receive $6,000 of the compensation, which he credited on the note to the insurance company, secured by the trust deed of June 12, 1867, which was paid in full by the $6,000, (Rec., pp. 11, 53), but he, as

trustee for the insurance company, consented that the city might enter and take possession of the condemned premises. (Rec., p. 104.)

Boone testified on cross-examination, that he did not consent that the city might take possession, but this testimony is manifestly erroneous, in view of the fact that he also testified that the agreement, after its execution by Stearns and others, was delivered to him, that he subsequently received from the city $6,000 on the voucher, and that he also received interest to the amount of $820 from Stearns, one of the parties to the agreement, which interest was paid and received solely under and by virtue of the agreement between Stearns and others and the insurance companies. (Rec., pp. 122, 99.) A party cannot receive an agreement, without objection, take the benefit of it, and subsequently repudiate it.

The bill avers and the decree finds that the condemnation proceedings were, in all respects in conformity with law, and operated as a lawful and sufficient condemnation of the land. (Rec., pp. 6, 10, 49.)

The effect of such lawful and sufficient condemnation was to condemn all interests, and all titles, as well the title and interest of Boone, the trustee, as of Gregory, the owner in fee, and to vest the fee simple title absolutely in the city charter, Sec. 15, *supra*.

The title conveyed by the trust deed from Bruner to Boone, therefore passed to the city by the comdemnation proceedings.

The insurance company, by accepting payment of part of the compensation awarded, and consenting that the city might enter and take possession of the premises for a street, was estopped from questioning the validity of the condemnation proceedings, and the effect of such proceeding on the title, viz: that the title in fee passed to the city.

Cooley on Con. Limit., 541, and note 1.
Hartshorn v. *Pattroff, et al.*, 89 Ill., R. 509.

The bill avers, and it was proven and the decree finds that the United States Circuit Court held in an ejectment suit brought by appellee, to recover possession of the premises, that the company and appellee were estopped to deny the validity of the condemnation proceedings. (Rec., pp. 16, 17, 56, 97.)

The fee having become vested in the city, by virtue of the condemnation proceedings, the city having taken opsession with the consent of the insurance company, and the company having elected to look to the city for its proportion of the compensation, and to the persons who executed the agreement with it for the interest, had no longer any interest in the land and nothing passed by the deed from Boone, the trustee, to the company.

But, on the hypothesis that the trust deed to secure the payment of the $10,000 remained in full force, notwithstanding the acceptance by the company of part payment of the compensation awarded, and its consent that the city might take possession, *no title to the compensation passed to appellee by the deed from the company of date Dec. 27, 1872, for the reason that the company, after the sale and conveyance to it Aug. 16, 1872, by Boone, the trustee, had itself no title legal or equitable to the unpaid balance of the compensation.*

The insurance company took the assignment of the voucher either as payment in full of the amount due on the notes secured by the trust deeds, or as collateral security G. A. Gregory, the assignee of the voucher, seems to have thought that the assignment operated as payment in full of the principal of the notes, and a discharge of the lien of the trust deeds, leaving the company to look only to the city, and Boone, the trustee, by receiving Gregory's order on

the city comptroller, seems to have acceded to this view. The order is as follows:

"Comptroller of the city of Chicago:

"Pay the within amount to Dr. L. D. Boone, as trustee "and general agent of the Union Mutual Life Insurance "Company of Maine, in full of principal due said company, "for lien on land, without recourse to me.

"C. A. GREGORY." (Rec., p. 92.)

Boone, however, testified on the subject as follows:

Q. "Do you recollect the assignment to the insurance "company, or to you, by Gregory, of a voucher which was "for $36,000, originally, but on which $20,000 had been "paid? Do you recollect that? (Handing witness paper.)

A. "Yes, sir; I remember that.

Q. "What was the object of that? State whether or "not it was taken as security *collateral to the principal se-* "*curity of the trust deed*, for the payment of the money "from Bruner?

A. "*It was so taken, sir.*

Q. "The company purchased the land, didn't they, at "the trustee's sale?

A. "Yes, sir.

Q. "How much did they bid? Did they bid the "amount due on the note—the balance due?

A. "*That is my recollection, sir; that they bid the amount* "*due.*

Q. "And this, you say, was only held by you as secu- "rity *collateral to the trust deed security?*

A. "Yes, sir."

The agreement between Marcus Stearns and others, and the insurance company, recites that the voucher was

assigned to the company as collateral security. (Rec., p. 104.)

The fact that the consideration named in the deed from Boone to the insurance company is $5,000, is a circumstance entitled to no weight, in opposition to Boone's testimony that the *actual* consideration was the balance secured by the trust deed. It is a very common occurrence that the consideration expressed in deeds differs from the actual consideration, and it is always competent to prove the latter, when material.

Ayres v. *McConnell*, 15 Ill. R., 230.
Sidders v. *Riley*, 22 *Ib.*, 109.

Both these propositions are illustrated by the evidence produced by appellee. The expressed consideration in the deed from the company to Tebbetts, the appellee, is $22,000, (Rec., p. 84), but Gregory testified that he made the purchase for Tebbetts, as his agent, and that the actual consideration was about $10,500. (Rec., p. 96.)

Certainly there could be no more competent witness as to the real consideration for the coveyance to the insurance company, than Boone, the trustee and agent for the company, who made the sale, and executed the deed.

Boone further testified that he cancelled the $10,000 note which the trust deed was made to secure, and that he showed it, *so cancelled*, to Gregory at the time the latter was negotiating for the purchase of the land as the agent of Tebbetts. (Rec., pp. 115, 116.)

He testified in reference to the voucher as follows:

"Q. Did you consider, as the agent of the company, "that you had any interest whatever in that voucher, after "the purchase of the land by the company, at the trustee's "sale?

"A. As a fact, I know that I did return this voucher to-

" Mr. Gregory after the sale, I think at the time of the sale " of the property to Mr. Tebbetts.

" Q. You returned that voucher to Mr. Gregory?

" A. Yes, sir.

" Q. Why did you give the voucher to Mr. Gregory?

" A. Well, I supposed he was entitled to it, of course, or " I should not have given it to him.

" Q. You supposed that Gregory personally was en- " titled to it?

" A. Yes, sir.

" Q. On the ground that he had assigned it to you *as* " *collateral security for that deed*?

" A. *Yes, sir.*" (Rec., pp. 111, 112.)

This evidence of Boone, as to the amount bid by the company at the trustee's sale, viz., the balance of the indebtedness secured by the trust deed and the cancellation of the note after the sale, uncontradicted as it is by anything in the record, is conclusive on the point that the note from Boone to the company, for $1,000 and interest, was fully paid and discharged by the sale under the trust deed. The bill also avers that the company bid the amount due on the ~~water~~ note. (Rec., 11.) Argument is certainly unnecessary in support of the proposition, that, after the sale and conveyance to the company, there could have been no recovery on the note against Bruner, the maker thereof.

Weiner v. *Heintz et al.*, 17 Ill., 259.
Mines v. *Moore*, 41 *Ib.*, 273.
Rabins v. *Swain*, 68 *Ib.*, 197.

The facts testified to by Boone would be a complete answer to a suit on the note, they would be conclusive evidence of payment in full.

The debt for the payment of which the voucher was as-

signed to the insurance company merely as collateral security, having been fully paid and satisfied by the sale to the company under the trust deed, the company had no longer any interest in the voucher, or in the compensations evidenced by it. The voucher was a mere pledge, and on payment of the debt, the payment of which it was pledged to secure, the lien of the pledgee, the insurance company, terminated, and it had no longer any title, legal or equitable, to it, and no right to dispose of it, otherwise than by returning it to the pledgor.

Story on Prom. Notes, 7th Ed., p. 284.
2 Parsons on Court, p. 110, *et sequens.*

Boone, the trustee, after the sale to the company, acting in accordance with the facts and the law, returned the voucher to Gregory, by whom it had been assigned to the company, as collateral security, and canceled the note. (Rec., pp. 112, 116.)

It is enough for the purpose of the case to show that the insurance company had no interest in the voucher after the conveyance by Boone to the company, August 16, 1872, without showing to whom the voucher and the unpaid balance of the compensation belonged, after that date. But, inasmuch as it may be said that Gregory makes no claim to it, and has testified as a witness in the case, that it belongs to his client, the appellee, and will probably so argue as counsel, I will proceed to show to whom the voucher belonged, at the date of the commencement of this suit.

Gregory, as he himself has testified, and as appears from the conveyance from Bruner to him, was, at the date of the confirmation of the assessment, the owner in fee of the land, subject only to the incumbrances created by the trust deeds, executed by his grantor. (Rec., pp. 87, 94.)

He was, therefore, entitled to the whole compensation

awarded, less the indebtedness secured by the trust deeds, and when that indebtedness was fully paid and discharged by the sale to the insurance company, he became entitled to the unpaid balance of the compensation, evidenced by the voucher, which he had assigned to the trustee as collateral security, and also entitled to the voucher. In other words, he became the owner of the unpaid balance of the compensation, and of the voucher evidencing it.

Gregory filed a petition in bankruptcy December 12, 1876, in the District Court of the United States, for the Northern District of Illinois, and was, at that date, adjudicated a bankrupt, and January 16, 1877, he made an assignment to R. E. Jenkins, who was appointed his assignee in bankruptcy, "of his real and personal estate, including "all his property of whatsoever kind, of which he was "possessed, or in which he was interested or entitled to "have, on the 12th day of December, 1876. The indebted-"ness of Gregory, as shown by his schedule filed in the "bankruptcy proceedings, amounted to about $297,000, "and more than $10,000 of proved claims remains unpaid." (Rec., p. 101.)

R. E. Jenkins, Gregory's assignee in bankruptcy, became the legal owner, for the benefit of Gregory's creditors, of the voucher, and the balance of the compensation evidenced by it, by virtue of the assignment in bankruptcy made January 16, 1877, and was such at the time of the commencement of this suit, viz., June 26, 1877. The owners of the unpaid claims against the bankrupt estate, amounting, as appears by stipulation in the record, to more than $10,000, are legally and equitably entitled to have the unpaid balance of the compensation applied *pro rata* on account of these claims.

The insurance company not only had no interest in the voucher, after its purchase of the premises at the trustee's

sale, which it could convey to Tebbetts, the appellee, but it did not attempt to convey or assign to him any interest in the voucher.

The company, by its purchase at the trustee's sale, merely became the owner of such title to the premises described in the trustee's deed, as the trustee had acquired by the trust deed from Burner.

This was all the trustee was authorized to sell, and all he did sell. (Rec., pp. 68, 81.)

I think it apparent from the record that the company only sold and conveyed to appellee what it acquired by the deed from Boone, the trustee. The deed from the company to Tebbetts purports to convey and quit-claim only the interest of the company in the premises therein described. (Rec., pp. 84, 85.)

Boone, the agent of the company, who negotiated the sale of the land to Tebbetts, testified as follows:

Q. "Now, when you sold, you say you negotiated the "sale to Tebbetts; then Mr. Gregory negotiated the sale "with you?"

A. "That is the way I recollect it."

Q. "What did you sell to Gregory at that time; the "land?"

A. "*The land.*"

Q. Did you sell anything more than the land?"

A. "*No, sir.*"

II.

THE COURT ERRED IN ALLOWING INTEREST ON THE UNPAID BALANCE OF THE COMPENSATION.

The allowance of interest was contrary to the agreement, and understanding of the parties, and the allowance of it operates as a fraud on the city.

In the State of Illinois interest is not recoverable, even in cases where the compensation to be paid for property to be taken for a public improvement is ascertained by the judgment of a court, unless possession be taken of the condemned property by the corporation seeking the condemnation.

The Supreme Court of Illinois has held, that in order to entitle the owner of condemned property to interest on the compensation awarded, two elements must exist and concur, viz.: a judgment of a court of record awarding the compensation and possession taken by the corporation seeking the con demnation, and that either of these elements being absent, interest is not recoverable.

Cook v. *South Park Commissioners*, 61 Ill., 115.

Ill. & St. Louis R. R. Co. v. *McClintock*, 68 *Ib.*, 296.

City of Chicago v. *Barbian*, 80 *Ib.*, 486.

South Park Commissioners v. *Dunlevy*, 91 *Ib.*, 49.

City of Chicago v. *Palmer*, 93 *Ib.*, 125.

I understand the *ratio decidendi* of these cases to be this: The statute of Illinois, which will be cited hereafter, allowing interest on judgments, refers to absolute judgments, but a judgment for compensation in condemnation proceedings is not ordinarily an absolute judgment; it is merely a judicial asertainment of the amount of the compensation to be paid, in the event that the corporation seeking the condemnation shall take possession of the premises, which may never happen, but if the corporation is in possession, at the time of the rendition of the judgment, then the private owner has an absolute right to the compensation, and the judgment will bear interest, and in cases where the corporation takes possession subsequently

to the rendition of the judgment, the judgment formerly conditional, becomes, in effect, absolute, by reason of the taking possession; and interest can be recovered on it from the date of possession. Hence in *Cook* v. *South Park Commissioners; Ill. & St. Louis R. R. Co.* v. *McClintock*, cited *supra*, interest was allowed, because possession had been taken, whereas in *South Park Commissioners* v. *Dunlevy*, *supra*, interest was not allowed, because possession had not been taken.

See particularly, *South Park Commissioners* v. *Dunlevy*, 91 Ill., 54–56.

I will state, in this connection, that the constitution of Illinois, of 1848, did not, in terms, require that the compensation for property taken for public use should be ascertained by a jury, and under that constitution and the laws made in pursuance of it, the compensation was usually fixed by commissioners. Sec. 13 of Art. 1, of the constitution of 1870, provides: "Private property shall not "be taken or damaged for public use without just com- "pensation; such compensation, when not made by the "State, shall be ascertained by a jury, as shall be pre- "scribed by law." The eminent domain law passed by the General Assembly, in pursuance of this provision, requires that in all cases where land is taken by corporations for public use the compensation shall be ascertained by a jury, and the judgment of a court. The nature of the judgment in such case is well defined by the Supreme Court in *City of Chicago* v. *Barbian*, 80 Ill., 485.

If there can be no recovery of interest in a case where there has been a judgment ascertaining the compensation, unless possession has been taken by the corporation *a fortiori*, this is true in a case like the present, in which there has been no judicial ascertainment of the compensation, but

a mere award by commissioners, confirmed by the common council of the city. (Rec., pp. 6–9; 48, 49.)

The city was induced to take possession of the condemned premises *solely by the action of appellee's grantor*, the insurance company, viz: by the company's agreeing to look not to the city, but to Marcus Stearns, and other persons, for the interest.

The agreement recites that the city could not legally take possession of the condemned premises until it had paid the compensation; that it could not then pay the compensation; that it might not be able or willing or liable to pay interest; that the insurance company had consented not to prevent the city from taking possession, &c.; and contains covenants for the payment of interest until the whole of the principal sum of $16,000 evidenced by the voucher shall be paid by the city. (Rec., p. 102 *et sequens.*) This agreement was delivered to Boone, trustee and agent of the insurance company, who collected interest on it, and subsequently surrendered it to Marcus Stearns, one of the parties to it. (Rec., pp. 99, 110, 121, 122.)

It is stipulated in the cause that the city and its board of public works had knowledge of the agreement, and that, *except for the agreement*, would not have taken possession of the condemned premises. (Rec., p. 100.)

This agreement was manifestly advantageous to the company. It is not pretended that interest at a greater rate than 6 per cent. per annum would have been recoverable, in any event, on the unpaid balance of the compensation, and that is the rate fixed by the decree, (Rec., p. 57,) but, by the agreement with Stearns and others, interest at the rate of 8 per cent. per annum was to be paid on the balance secured by the trust deeds. (Rec., p. 106.)

The insurance company, by its conduct in the premises,

became estopped to claim interest as against the city. It induced the city to take possession, on the hypothesis that Marcus Stearns and others were to pay the interest, until such time as the city should pay the unpaid balance of the compensation, and that it, the insurance company, would not look to the city for interest, and now, appellee, its grantee, and privy in estate, sues for interest.

"When a person tacitly encourages an act to be done, "he cannot, afterwards, exercise his legal right in oppo- "sition to such consent, if his conduct, or acts of encourage- "ment, induced the other party to change his position, so "that he will be pecuniarily prejudiced by the assertion "of such adverse claim."

Swain v. *Seamens*, 9 Wall., 254.
Vide etiam—Alford v. *United States*, 8 Ct. of Ch., R. 364.

Appellee's grantee, the insurance company, having by its conduct and *express consent*, induced the city to take possession, upon the understanding that interest on the unpaid balance of the compensation would be paid by Stearns and others, the appellee cannot recover interest to the pecuniary prejudice of the city, which, on the authorities cited *supra*, would not be recoverable, had possession not been taken.

The agreement between Stearns and others and the company contains the fotlowing:

"It being, however, distinctly understood that said "Boone and said insurance company do not, by said con- "sent, waive or abandon any right they may have on said "notes against the maker thereof, or any right of suit "against the said city for the recovery of said money, or "any right of entry or possession of said land." (Rec., p. 104.)

The reservation does not affect the foregoing argument, because, *first*, it appears from the record that appellee sued the city in ejectment for the condemned premises, and the court found for the city, holding that neither the appellee, nor his grantor, had any right of possession, (Rec., pp. 16, 17); *secondly*, the insurance company never brought suit against the city for the recovery of the money, but, on the cortrary, elected to consider the voucher as collateral security merely, and to rely upon what it deemed the principal security, viz: the trust deed; and, *thirdly*, such reservation is no answer to the proposition that the company, by agreeing to look to Stearns and others for the interest, induced the city to take possession.

But even though the agreement between Stearns and others, and the insurance company had not been made, interest could not have been legally recovered.

Interest is solely the creature of the statute, and does not exist at common law, in the absence of an express agreement.

County of Madison v. *Bartlett*, 1 Scam., 2 Ills., 67.
Sammis v. *Clark et al.*, 13 Ills., 544.
Illinois Central R. R. Co. v. *Cobb et. al.*, 72 Ills., 148.

The following are the statutory provisions which were in force, at the time of the comfirmation of the assessment.

"INTEREST."

Act of 1845, Sec. 2.

"Creditors shall be allowed to receive at the rate of six "per centum per annum, for all moneys after they become "due on any bond, bill, promisory note, or other instru "ment of writing, on any judgment recovered before "any court or magistrate authorized to enter up the same

" within this State, from the day of signing judgment until " the effects be sold, or satisfaction of such judgment be " made; likewise on money lent, on money due on the set- " tlement of accounts from the day of liquidating accounts " between the parties, and ascertaining the balance, on " money received to the use of another, and retained with- " out the owners knowledge, and on money with-held by " an unreasonable and vexatious delay of payment." (Gross' State of Ill., 1869, p. 370.)

" JUDGMENTS AND EXECUTIONS."

Sec. 4. " In all executions to be issued upon judgments " hereafter to be recovered upon contracts either express " or implied, it shall be lawful to dirrect the collection of " interest, on the said judgment from the time of recover- " ing the same until paid, at the rate of six per centum per " annum." (*Ib.*, p. 379.)

Act of 1845, Sec. 5.

" There shall be computed and collected upon all judg- " ments, founded upon actions *rededcitu* (*ex delicto*) inter- " est, at the rate of six per cent. per annum, from the date " of such judgment until the same is paid; such interest to " be a lien upon the property of the defendant, or defend- " ants, and to be collected by the proper officer having " charge of the execution of the final process in such judg- " ment, and, when collected, to be paid to the plaintiff or " plaintiffs, in any such judgment, by such officer." (*Ib.*, p. 379.)

Sec. 2, above quoted, was re-enacted in the Illinois Revision of 1874, and is now the law, and the interest on judgments is still six per cent.

The Supreme Court of Illinois has decided, in numerous cases, that the statute (Sec. 2 *supra*) allowing interest on claims not reduced to judgment, does not apply to munici-

pal corporations, and that such corporations are not bound to pay interest in the absence of an express agreement to pay it.

County of Pike v. *Hosford*, 11 Ill., 170, 1849.
City of Pekin v. *Reynolds*, 31 *Ib.*, 529, 1863.
City of Chicago v. *People ex rel., &c.*, 56 *Ib.*, 327, 1870.
City of Chicago v. *Alcock*, 86 *Ib.*, 384, 1877.
South Park Coms. v. *Dunlevy*, 91 Ill., 54–55, 1878.

In the case of *City of Chicago* v. *People*, *supra*, the judgment of the lower court was reversed *solely* on the ground that interest was allowed, there having been no express agreement to pay interest. (56 Ill., p. 334.)

These cases are conclusive that the statute of Illinois, as construed by the Supreme Court of the State, allowing interest on claims not reduced to judgment, does not apply to municipal corporations.

The case of *Wheeler* v. *The City of Chicago*. 24 Ill., 105, decided in 1861, was relied on by counsel for appellee in the lower court, but that case has been clearly overruled by the decision in *City of Pekin* v. *Reynolds*, 31 Ill., 529, and the other later cases cited, *supra*.

The action was assumpsit for damages awarded for property of the plaintiff, condemned in special assessment proceedings, as in the case at bar. The city charter then in force, gave two years to collect the assessment made to pay the damages or compensation awarded, and the court held, that the city having failed to exercise due diligence to collect the assessment, the award, upon the expiration of the two years limited by the charter for its collection, became due and payable, and the court allowed interest from that date, *upon the express ground that in*

terest was authorized in such case by Sec. 2 of the Interest Act of 1845, cited *supra*.

In the *City of Pekin* v. *Reynolds*, 31 Ill., 529, decided in 1863, the action was debt, to recover the amounts due on certain coupons. The following form of the coupon sued on is given in the statement of the case.

"The city of Pekin will pay the bearer, at the American "Exchange Bank, in the city of New York, on the first "of January, 1861, forty dollars interest, due on their bond "No. 43."

Here was an express agreement to pay a sum certain on a day certain. Interest was claimed on the amount of the coupon from the date it fell due. Section 2, of the statute, which was the same section referred to in *Chicago* v. *Wheeler*, *supra*, provided: "Creditors shall be allowed to "receive at the rate of six per centum per annum for all "money's after they become due, on any land, bill, prom-"isory note or other instrument in writing." The claim for interest on the amount of the coupon was within not only the spirit, but the letter of the section, if it applied to municipal corporations, but the court held that municipal corporations, *not being named in the statute*, it did not apply to them. The opinions in the two cases were written by the same judge, Mr. Justice WALKER, so that oversight, or inadvertance in the City of Pekin case, is not to be presumed, especially in view of the fact that it has been approved in all subsequent cases, whereas the case of *Chicago* v. *Wheeler*, has not, so far as I have been able to discern, been approved in a single subsequent case. But even though the case of *Chicago* v. *Wheeler* were not overruled, and were now the law, it is no answer to the error assigned.

The court allowed interest in that case, after the expiration of *two* years from the date of the confirmation of the

assessment, assigning as a reason for so doing, that the General Assembly, by making the assessment a lien for *two* years from the date of its confirmation, impliedly indicated that a delay of more than *two* years would be unreasonable." 25 Ill. p. 482.

Chap. 8, Sec. 4, of the city charter then in force provided as follows:

Sec. 4. "All taxes and assessments, general or special, "levied or assessed by the common council under this act, "shall be a lien upon the real estate upon which the same "may be imposed, noted or assessed, for two years from "and after the corrected assessment roll shall have been "confirmed, etc." Priv. Laws of Ill., 1851, p. 158.

But Section 36 of Chapter 7 of the city charter of 1863, under which the assessment in question was made, provided that an assessment should be a lien for *five* years. It is as follows:

SECTION 36. "If, from any cause, the city shall fail to "collect the whole or any portion of any special assess- "ment which may be hereafter levied, and which shall not "be canceled and set aside by the order of any court upon "*certiorari* or appeal, for any public improvement required "to be paid for by special assessment, the common coun- "cil may, at any time within *five* years after the confirma- "tion of the original assessment, direct a new assessment "to be made upon the delinquent property, for the amount "of such deficiency and interest thereon from the date of "such original assessment, which assessment shall be "made, as near as may be, in the same manner as is here- "in prescribed, for the first assessment. In all cases, "where partial payments shall have been made on such "former assessment, they shall be credited or allowed on "the new assessment to the property for which they were "made, so that the assessment shall be equal and impartial

" in its results. If such new assessment prove ineffectual, " either in whole or in part, the common council may, at " any time within said period of five years, order a third, " and so on, to be levied in the same manner and for the " same purpose; and it shall constitute no legal objection " to such re-assessments that the property may have " changed hands or been encumbered subsequent to the " date of the original assessment, it being the true intent " and meaning of this section to make the cost and ex- " pense of all public improvements to be paid for by a " special assessment a charge upon the property assessed " therefor for the full period of *five* years from the confirm- " ation of the original assessment, and for such longer pe- " riod as may be required to collect, in due course of law, " any new assessment ordered by the common council " within that period."

Laws and Ord., 1873, p. 454.

The assessment in the case at bar was conferred Oct. 5, 1868, and by the statute quoted *supra* was a lien for five years from that date, or until Oct. 5. 1873. Therefore, even though the Wheeler case was authority, interest could only be allowed from the latter date, but the court decreed interest from January, 1, 1870, being for three years more time than interest could have been allowed for on the authority of the Wheeler case, if that case were not overruled.

No interest was allowable under the statute allowing interest on judgments, because there was no judgment on the assessment proceedings awarding the compensation.

The assessment was made by commissioners, and confirmed by the council. This is averred by the bill and found by the decree. (Rev., pp. 6-9; 48-49.)

The fact is that the city never collected a great part of

the special assessment levied against property benefited for the cost of the improvement. Hence, as stated in the agreement between Stearns and others, it could not conveniently pay. (Rec., p. 104.)

The court will observe by section 14, *supra*, that any person dissatisfied with the compensation awarded for his land, might appeal to some court of general jurisdiction in the county. There was no appeal by owners of property for which compensation was awarded.

The proceedings for the collection of the assessment for benefits, and appeals in respect thereof, were governed by other provisions of the statute.

Section 13, *supra*, provides that a warrant shall issue.

Sections 12 and 15, of Chap. 9, of the act of 1863, provides as follows:

"SEC. 12. It shall be the duty of the collector, between the fifteenth day of January and the last day of February in each year, to make report to some court of general jurisdiction held in said city, at any special or general term thereof, of all the taxes and assessments then remaining unpaid upon the real estate tax list, and of all special assessment warrants which were delivered to him on or before the last day of the preceeding October, asking for judgment against the several lots and parcels of land, or other property described in such list or warrants, for the amount of taxes, assessments, damages and costs respectively due thereon. The collector shall give notice, by six days publication thereof in the corporation newspaper, of his intended application for judgment, which shall briefly specify the nature of the respective warrants upon which such application is to be made, and request all persons interested to attend at such term. The advertisement so published shall be deemed and taken to be sufficient and

legal notice of the aforesaid intended application by the collector to such court for judgment, and shall be held a sufficient demand and refusal to pay the said taxes and assessments."

"SEC. 15. It shall be the duty of the court, upon the filing of said reports, to proceed immediately to the hearing of the same, and they shall have priority over all other causes pending in said court. The said court shall pronounce judgment against the several lots and parcels of land or other property described in said reports, for which no objections shall be filed for the amount of the tax or assessment, damages and costs due severally thereon. The owner of any property described in said reports, or any person beneficially interested therein, may appear at said court, at the time designated in said collector's notice, and file objections in writing to the recovery of the judgment against such property; but no objection shall be sustained, founded on any mere formal irregularity or defect. The court shall hear and determine all objections in a summary way, without pleadings, and shall dispose of the same with as little delay as possible consistently with the demands of public justice," etc.

Rev. Laws Ill., 1863, pp. 102, 103.

The owners of property assessed for benefits appeared on the application for judgment against their lands, filed objections, judgment was rendered against the lands, they appealed, and the Supreme Court reversed the judgment at its September term, 1870.

Southeim, et al., v. *Chicago*, 56 Ill., 429.

The confirmation of the assessment was not a judgment within the meaning of the statute allowing interest on judgments.

The assessment was made under the constitution of 1848. This is shown by the dates of the proceedings. The ordinance ordering the improvement was passed May 25, 1868, and the assessment was confirmed October 5, 1868. (Rec., pp. 6-9; 48, 49).

The Supreme Court of Illinois in the case of *Rich, et al,* v. *The City of Chicago*, 59, Ill., 286, held in respect to an assessment precisely similar to the one under consideration, and made under the same law and in the same manner, that neither the commissioners of the board of public works, nor the common council were judicial officers, and that neither nor both combined could perform a judicial act.

That case was an appeal from a judgment of the Superior Court of Cook County, confirming a special assessment for benefits by the widening of Michigan avenue, from Twenty-second to Thirty-second streets. Compensation or damages for property taken for the widening and special benefits which might accrue from the widening, were assessed, in conformity with the provisions of the statute heretofore referred to, in the same proceeding. The common council having confirmed the assessment, the application to the lower court was for judgment against, and for sale of the lands delinquent for the amounts of the assessments against them for special benefits. If the language of the statute was to govern, then, upon the application, no question could have been made as to the damages awarded for land taken for the improvement, because the statute made the confirmation of the assessment by the common council conclusive as to damages, where no appeal was taken from such confirmation.

Laws and Ord. 1873, p. 444-5, Secs. 14 and 15.

Nevertheless, the objectors to the assessments for benefits, and to the rendition of judgment for the same, did object to the award of damages for land taken.

The court say: "The third objection assails the foundation of the entire proceeding, and is one of a graver character. The appellant's counsel insists that the judgments should all be reversed, on the grounds that the provisions of the city charter relative to the taking of private property for public use, are unconstitutional and void, because they purport to vest the board of public works and the common council of the city of Chicago with the authority to inaugurate proceedings in their discretion, for taking such property; to determine all preliminary facts and fix the compensation to be made; to effectuate, by their own acts, the condemnation of the property of the citizen, and divest him thereof; and their decision is made final and conclusive. This, it is claimed, is the exercise of judicial authority, which, by the division of the powers of the government by the State constitution, is expressly prohibited to all departments of the government not belonging to the judicial, and *neither the board of public works nor common council can be said to belong, in any sense, to the judicial department*, (55 Ill., 289.)

The court then proceeds to discuss the question raised by the objection, viz., whether the determination of the question of compensation was, under the constitution of 1848, a judicial act, and whether the commissioners of the board public works were judicial officers, or the common council a judicial tribunal, the former having made, and the latter having confirmed the assessment, as in the case at bar. The court holds distinctly and expressly that the determination of the question of compensation is a judicial act, which can be performed only by the judicial department

of the government, and that neither the commissioners of public works nor the common council belonged to such department. (59 Ill., pp. 290-5.)

If neither the making nor the compensation of the assessment was a judicial act, then, clearly, the award of the compensation was not a judgment.

Respectfully submitted,

FRANCIS ADAMS,

Corporation Counsel, for Appellant.

WILLIAM C. GOUDY,

Of Counsel.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1880.

No. 299.

THE CITY OF CHICAGO, *Appellant,*

v.

WILLIAM C. TEBBETTS, *Appellee.*

Appeal from the Circuit Court of the United States, for the Northern District of Illinois.

Brief for William C. Tebbetts, Appellee, and Complainant below.

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MAY IT PLEASE THE COURT:

This case comes here by appeal on the part of the City of Chicago, Illinois, the principal defendant below, from a decree against said defendant in favor of William C. Tebbetts, the complainant below; being an appeal from the decision of the Hon. Thos. DRUMMOND, of the Circuit Court of the United States for the Northern District of Illinois, in a suit in chancery, wherein a final decree in favor of Mr. Tebbets was rendered against the City of Chicago, on the 11th day of December, 1877; that said complainant "is entitled to have and recover of and from the said "City of Chicago the sum of ten thousand dollars, together "with certain interest on said sum at the rate of six per

" cent. per annum, and the same being computed, with the " deduction aforesaid, the aggregate is the sum of thirteen " thousand nine hundred and fifty-three dollars and thirty- " three cents, including principal and interest. And it is " hereby ordered that the City of Chicago do pay over to " said Tebbets, or to his solicitor in this suit, the sum of " $13,953\frac{33}{100}$. together with interest thereon at six per " cent. per annum from the date of entering this decree " till payment of the same; and that the said defendant do " pay the cost of this suit, and that the complainant do " have his costs to be paid by said City of Chicago.

" And upon and at the time of such payment the title to " said land shall absolutely vest in the said City of Chicago " for a street as aforesaid, and all the parties to this suit " shall be forever barred from having or claiming any " right, title, or interest in the same, as against said City " of Chicago; and that said Bruner shall be discharged of " and from all liability on said note or notes aforesaid; and " it is further adjudged that said Charles A. Gregory has " had no interest in said award or damages, or in said land " since the 15th day of May, A. D. 1869, as against the " said City of Chicago, by virtue of the premises or other- " wise; and upon payment of said sum aforesaid, said " Tebbets shall surrender up said voucher to said City of " Chicago."

The decree recited the facts as alleged in the bill of complaint, and adjudged that the same was fully sustained by the proofs and admissions made on the hearing.

The case made by the bill and answer, and fully proven, [and there is no dispute about the facts, the only contest being as to the effect of such facts, and the law applicable to the case,] is as stated below in a brief abstract.

The bill was filed June 26, 1877.

Assignment of Cross Errors.

1. The court erred in decreeing that the $820, or any part of it, should be deducted from the principal and interest due on the award.

2. The court erred in not allowing appellee interest on the award from June 1, 1869, to date of decree, and that without any deduction.

Abstract of Bill, and Answer.

[The italics below refer to the answer of The City of Chicago.]

1. Bill sets out condemnation of the land in question by the city of Chicago for a street—part of Dearborn street. Confirmation of the assessment on the 5th day of October, 1868. *Answer by City of Chicago only. Admitted by answer.*

That city took possession June 1, 1869. *Admitted.*

2. That Bruner owned the land in fee before the condemnation, and in September, 1867, sold same to Gregory, subject to two trust deeds. That Bruner conveyed the land to Boone as trustee, in trust by two trust deeds, to secure the Union Mutual Life Insurance Company of Maine, on two notes of Bruner's to said company, one for $10,000 and interest, and one for $6,000 and interest. *Not denied.*

3. That at the time of condemnation Gregory owned the equity of redemption. *Not denied.*

That about the 14th of May, 1869, Gregory exhibited to the city of Chicago a sufficient abstract of title of said lands, which was satisfactory to the city, showing who owned the respective interests in the land. *Denied as to abstract furnished.*

That the city had full knowledge of all who were interested in title. *Not denied.*

That $36,000 was awarded to the owners of the land as damages. *Admitted.*

4. That the city of Chicago paid Gregory $20,000 on account of a voucher which was issued to Gregory May 14, 1869, for the full amount of damages. *Is ignorant of this voucher.*

5. That Gregory and wife made and delivered to the

City of Chicago a quit claim deed of their interest in the land. *Neither admitted nor denied.*

6. That Gregory, with the knowledge of the city, then and there assigned to Boone, trustee, and agent of Union Mutual Life Insuarnce Company, the vouchers, and afterwards the city paid Boone $6,000 on account of the damages, and Boone cancelled the Bruner $6,000 note on June 5, 1869. *Not denied.*

7. That on May 13, 1872, the Board of Public Works of Chicago gave 10 days' notice in corporation newspapers that the money was collected, and ready in the treasury to pay over to parties entitled, &c. *This averment is not denied by the answer, and it is proven to be true by the stipulation in evidence.*

8. That Boone, trustee, foreclosed the $10,000 trust deed by sale Aug. 16, 1872, and that Union Mutual Life Insurance Company bought the land for full amount of debt, &c. *Not denied.*

Boone conveyed to the company. *Not denied.*

9. That Boone as agent and trustee, assigned and delivered to Tebbetts the voucher for condemnation money, and that he holds the same ready to deliver up on payment &c. *Not denied.*

10. That Tebbetts bought the land of Ins. Co., and paid upwards of $10,000 for the same, and it was agreed that Tebbett should have all the rights of Boone and of Co., to the land damages. *Not denied.*

11. That the Ins. Co., assigned and delivered the note to Tebbetts : That Tebbetts is ready to consider the $10,600 note paid when the city shall pay him the money and interest. *Not denied.*

12. That sundry persons made some agreement to which the insûrance company assented through Boone

whereby license was given to the city to go into possession of the land in advance of the actual payment of the damages; but that Boone and insurance company neither of them waived any rights, and thereby expressly reserved all rights as against the city. *Admitted.*

(Boone did not have possession to give up.) *Legal effect of the agreement claimed to be a waiver of interest, and exoneration of city from paying interest.*

13. That by law the city could not enter on the land before tendering the money, &c. *Admitted.*

14. Avers diligence on part of complainant and Boone in trying to collect the money—avers numerous demands on the city for the money, and suits for the land. *Not denied.*

15. Avers that the city, for an unreasonable length of time, has failed and neglected to collect or pay over the damages. Claims interest as damages from June 1, 1869. Avevers vexatious and unreasonable withholding of the money from the time of taking possession up to the time of suit—i. e., the filing this bill.

Denies legal liability to pay interest.

16. That Bruner insists he shall be exonerated from liability to pay, and complainant offers to take the money from the city in satisfaction, &c.

17. That no part of the $10,000 has ever been paid, principal or interest, since January 6, 1869. That Bruner refuses to pay. *Not denied.* (See p. 13, Transcript.)

That city has always refused to pay. *Not denied.*

18. Sets out copy of voucher. Avers the legal duty, and a promise to perform it, and a breach tortiously, of performance. Answer of city *claims that voucher is not an instrument on which city is liable.*

The City of Chicago gave notice by due publication in in its corporation newspaper, according to law, as provided the city charter should be done whenever the money should be collected to pay the land damages, that the money had been collected to pay all these claims (including the one in question) and was deposited in the city treasury. This notice was published May 21, 1869, *and on the 1st day of June, 1869,* the *City took actual possession of the land, and has used it ever since for a street.*

This possession was taken without any consent or request of Boone, or the Union Mutual Life Insurance Company, though with their knowledge, but was done in the knowledge on the part of the City that the Stearns agreement was made on May 13, 1869.

Quære: Is the City of Chicago entitled to plead a payment made upon the interest on the note before foreclosure, by strangers between whom and it there was no privity of estate, and who expressly stipulate that such payment shall not enure to the benefit of the city of Chicago?

Has the payment of *any interest* on the note anything to do with the case?

Is not the only question, who owned the land?

The equity of redemption was cut off against *all parties* by the foreclosure.

Tebbetts recovers because the law makes the damages payable to the owner of this land.

The proper question to ask is, shall not the City pay the damages, and the interest on the same from such time as it may be proven to run?

The Insurance Company is not proceeding for any money in this case. It is another party who is concerned in the recovery, and he, the complainant, is not asking for any interest on the note. Does Tebbetts ask to get any

money twice? Not a bit of it. Tebbetts has no right of recourse back on the Insurance Company. The Insurance Company received some interest from Stearns *before the foreclosure;* but under the "agreement" it was expressly stipulated that such payment should *not enure to the benefit of the City of Chicago:* it was a payment on Buner's note, not on the award—a voluntary payment by strangers, to prevent foreclosure.

The city could have no equity to have it so enure, even in the absence of that provision; and to cut off all possibility of it, it was stipulated: "It is however understood "that any moneys which said city may at any time pay "to said company as and for interest on said voucher shall "be credited as so much interest paid on said note, and "*shall relieve the said parties of the first part from their* "*aforesaid engagement to pay such interest, or be re-*"*funded to them upon the final payment of the princi-*"*pal of said notes to the extent that the city shall pay* "*the same.*" So it was not contemplated that the city should be exonerated from its legal liabilities.

If it were a fact that the *Insurance Company* has received interest twice (as it has not), it would be a reason for Stearns & Co. to recover back from the Insurance Company; but it is not justice or equity to make Tebbetts suffer in this case. He is asking nothing inequitable, that the city should pay him all the damages they owe him as owner of the land.

Another provision of the agreement is:

"And said Insurance Company and said Boone have, "at the special request of said parties of the first part, "consented to take no legal steps at present to prevent "said city from occupying said land, provided payment of "interest on said notes is guaranteed to them by the par-"ties of the first part; it being however distinctly under-

"stood that said Boone and said Insurance Company do "not by said consent waive or abandon any right they "may have on said notes against the maker thereof, or "any right of suit against the said city for the recovery of "said money, or any right of entry or possession of said "land."

The agreement was a voluntary collateral guarantee, made by strangers to the City, but who stipulated that it should not avail the City to lessen the liabilities of the City. A new party is now the actor. He never agreed to lend any of his money to the City of Chicago at 6 per cent. interest. It is the tortious acts of the City which puts him in this position.

#820. This claim to deduct $8~~6~~0 is a novety, when all the facts are presented and understood.

#820. The court below allowed the City of Chicago a credit of this $8~~6~~0. This is the deduction referred to in the decree, as recited on the first page of this brief. This allowance of a credit was error, and appellee complains of the same. The sum decreed should be increased by this item.

II.

The *right of property* in the land had not been affected by the condemnation, nor by the payment to Gregory, nor by the payment of one of the outstanding mortgages; the title was not divested out of Boone, trustee, except by the conveyance to the Insurance Company, and by it to the complainant.

Nothing short of "just compensation" *actually paid* can or could change the right of property.

Cook v. *So. Park Comrs.*, 61 Ill., 121; *Mitchell* v. *I. & St. L. R. R. Co.*, 68 Ill., 288; *The People* v. *McRoberts*, 62 Ill., 38; *The People* v. *Williams*, 51 Ill., 63; *Rockford*,

R. I. & St. L. R. R. Co. v. *Coppinger*, 66 Ill., 510; *Ill. & St. L. R. R. Co.* v. *McClintock*, 68 Ill., 296.

Damages *must be paid* before possession of the land can be *taken, or any right to it acquired.*

Chicago & Mil. R. R. Co. v. *Bull*, 20 Ill., 218; *Johnson* v. *Joliet & Chicago R. R. Co.*, 23 Ill., 124; *Shute* v. *Chicago & Mil. R. R. Co.*, 26 Ill., 436.

Art. XIII., § 11. Constitution of Illinois of 1848.

"No person shall for the same offense be twice put in "jeopardy of his life or limb; nor shall any man's property "be taken or applied to public use without the consent of "his representatives in the General Assembly, *nor without* "*just compensation being made to him.*"

Art. II., § 13. Constitution of Illinois of 1870.

"Private property shall not be taken or damaged for "public use without just compensation. Such compensa- "tion, when not made by the State, shall be ascertained "by a jury, as shall be prescribed by law. The fee of "land taken for railroad tracks, without the consent of the "owners thereof, shall remain in such owners, subject to "the uses for which it is taken."

The charter of the city of Chicago of 1863, and under which the proceedings were had, provides as follows:

"As soon as the money is collected, and ready in the "hands of the treasurer to be paid over to parties entitled "to damages for property condemned, ten days' notice "thereof shall be given by the Board of Public Works in "the corporation newspaper; *and the city may then, and* "*not before, enter upon, take possession of, and appro-* "*priate the property condemned.*" This is set out in the the pleadings. See § 7 City Charter of 1863, Chap. 7, § 16.

It was held in the case cited below:

"In regard to similar laws, it has always been the "doctrine of this court, that the damages must be paid "before possession of the land can be taken, *or any right* "*to it acquired.*"

Cook v. *So. Pk. Comrs.*, 61 Ill., 120, citing: 20 Ill., 218; 23 Ill., 124; 26 Ill., 436.

"The Legislature cannot exercise judicial power, and "therefore mere legislation will not accomplish the trans-"fer," (*i. e.*, of title).

61 Ill., 118.

"No freeman shall be * * * in any manner deprived "of his life, liberty or property, but by the judgment of "his peers, or the law of the land." Constitution; cited also in the above case.

The importance of this doctrine in this case (and it is asserted again and again, and the Supreme Court of this State is jealous of its infringement) is, that this land in question does not belong to the City of Chicago, and never did; it has no right to it even subject to the trust deed—and the trust deed is foreclosed — therefore, it is not a question of what is due on the note. The City is equitably entitled to its easement, and cannot be put out of possession, for it would have to be let in again on payment being made, but this is ruled merely to avoid circuity; but, nevertheless, the ownership of the land is in Tebbetts, and consequently the right to the compensation and the interest on it. The note and trust deed no longer figure in this case. If what was due on the note affected the case, why not give Tebbetts interest at 8 per cent., according to the tenor of the note? And why give him interest from any other time than that from which there has been a failure to collect the interest on the note? We must be consistent;

we are dealing with principles here, and not arbitrarily decreeing anything.

The case of *Mayor and Aldermen of Jersey City ads. Fitzpatrick*, 36 N. J., 120, is to the effect, that *any consent* of the owner of the land to the city taking possession of the condemned land, does not affect his rights; that in such case he has a right to insist that the legal burden and duty of the city shall be discharged by the city. *The case is exactly in point on the question of title and ownership.*

In the case last cited there was consent to possession.

This whole proceeding of the city is *in rem* and *in invitum*, and is *strictissimi juris.*

"If the damages assessed are not paid, the Park Com-
"missioners cannot occupy the land, for it is the well
"established doctrine of this court, that in *no other mode*
"can an owner be deprived of his land through the exercise
"of the power of eminent domain."

51 Ill., 68; and cites *Shutes* v. *Chicago & Mil. R. Co.*, 26 Ill., 436.

"It is a sound and inflexible rule of law, that when
"special proceedings are authorized by statute, by which
"the estate of one person may be divested and transferred
"to another, every material provision of the statute must
"be complied with. He has a right to insist upon a strict
"performance of all the material requirements, and espec-
"ially those designed for his security, and the non-obser-
"vance of which may operate to his prejudice."

Marsh v. *Chestnut*, 14 Ill., 225; quoted and cited in *Mitchell* v. *I. & St. L. R. R. Co.*, 68 Ill., 288.

INTEREST IS RECOVERABLE IN THIS CASE.

Demands for the money were repeatedly made upon the City, by Boone and by complainant.

There has been *unreasonable* and *vexatious delay* in the payment of the money; hence, under the Interest Statute of Illinois (R. S. Ill., Ch. 74, § 2,) arises a liability to pay interest at 6 per cent. per annum on the damages withheld.

The only question then, is, from what date does the *default* of the City exist? or, *when* did its *peremptory duty* under the law to pay the damages arise? There can be no question that it arose on June 1, 1869; when the City took possession.

If the City, or any party, had any doubt as to the City's liability to pay interest, at and from that time, such doubt does not affect the legal right and liabilities of the respective parties.

The city is entitled to the *easement* of a street; and when it shall pay the damages and interest, is entitled to the fee of the land, and *never before.*

We say the City could not deny it had collected the money; there is some evidence that it had the money in its treasury for the purpose of this payment, but even if it had not, then the court thought that, from October, 1868, up to Dec. 31, 1869, was ample time to collect the assessment in, if, in point of fact, it had not been collected before; and so ordered interest to be recovered from January 1, 1870. On what ground is any deduction to be made?

The evidence that it had the money in the treasury, May 21, 1869, to pay these damages, is on page 93 of Record, and p. 37 of Transcript.

The question is: How much damages does the City of Chicago owe? and who is entitled to demand the damages by virtue of being owner and grantee of the land, and holding the voucher? All persons possibly concerned in the question are made parties to the suit.

The questions which arise in this case upon the facts as admitted or as proven, are,

1st. *Is the City of Chicago liable* to pay for the land which it has been occupying for a street, as described in the pleadings?

2nd. *If liable* to pay for the same, *to whom* is the City liable to pay such money as it may be found to owe for the land.

3rd. If *liable* to pay for such land, *when* did the liability *commence.*

4th. Was, or not, the City of Chicago *bound* to use *due and reasonable diligence* to collect and pay over the money for such land?

5th. And if bound to use due and reasonable diligence to collect and pay over the money for such land, has the city exercised such diligence?

6th. Did the City of Chicago, in point of fact, ever collect the money for this land?

7th. If the City of Chicago, did collect the money, what excuse is there for not paying it over?

8th. If the City of Chicago has never collected and paid over the money, and if the payment of the same has been duly demanded and its payment has been refused, has not the City of Chicago been guilty of vexatiously withholding the money?

9th. Is the City of Chicago liable for interest on the sum of money due for said land?

But the City gave notice on May 13, 1872, that the money *was* collected and ready to pay over, and also gave notice, May 21, 1869, to same effect; but nothing is in evidence to show *when* it was collected, so if collected within the two years, which is *the presumption*, then the *withholding is illegal and vexatious.*

If not collected within the two years, then the neglect of duty creates a liability to pay interest.

But it is said that it is admitted that the City would be liable to pay interest, if it had not taken *posession* of the land under *permission* of the owner.

The position of the counsel for the city is, I suppose, that the City *would have been liable to pay interest* if the City had taken possession of the land *without permission*, for if this is not his position I do not perceive how it makes any difference whether the permission was given or not.

Now let us see.

We will suppose the lot to be *vacant;* the City *condemns it and then goes into possession*, not having tendered payment for it, and without permission. Now, it is admitted, by the counsel for the City, that the City would be liable to pay interest on the award in such a case. Well, why? Where is the statute requirement for interest? On what *compulsion* must the City pay interest in such a case?

I too say the City must pay interest in such a case, but I put it on the true reason and foundation.

There is no statute saying the city shall pay interest in such a case in express words; but the interest is demandable *so soon as the right of the owner of the land* to have the use of the money becomes perfect and complete and the money is then withheld. So soon as there is nothing more left for him to do but to receive the money, and nothing more left for the City to do but to pay the money.

For from that moment the withholding of the money becomes *tortious*, and to prevent the party from taking advantage of his own wrong, the interest is demandable *ex-equo et bono.*

The right to transfer the property from one grantee to another grantee, down to the complainant has not been

affected by any proceedings on the part of the City of Chicago.

In equity, the title to the land follows the *security*. The complainant owns the land or the security, one or the other.

Land damages for land taken under eminent domain, remain land.

Story's Eq., Jurisp., §§ 1214, 1216.
Durando v. *Durando*, 23 N. Y., 331.

III.

1. In any event, the complainant is the owner of the *award*, or he is the owner of the land: and if the owner of one or the other, then entitled to the damages.

2. All persons in interest have been made parties to the bill; and it is *admitted* by all parties, except the City of Chicago, that the complainant is entitled to the compensation.

As to the City it is *proven* that the complainant is entitled.

Durando v. *Durando*, 23 N. Y., 331.
Story's Eq. Jurisp., §§ 1214, 1216.

IV.

Now, if complainant is entitled to the compensation, the the next question is:

When did the *duty* of the City of Chicago become *absolute*, to pay over the money?

We say on and from June 1st, 1869; or on and from May 14, 1869:

The voucher bears date and was issued May 14, 1869. The possession, for purposes of public use, was taken by the appellant June 1, 1869. The city has ever since used the land for a public street.

V.

Interest, at 6 per cent. per annum, should begin to run on the demand from the time the city was in default by its own wrongful acts, either of commission or of omission.

This is well settled law.

La Salle County v. *Simmons*, 5 Gilm., 513.
Bourland v. *County of Peoria*, 16 Ills., 546.
City of Chicago v. *Wheeler*, 25 Ills., 396.
Chicago & N. W. R. Co. v. *Shultz*, 55 Ills., 421.
Bradley v. *Gieselman*, 22 Ills., 494.

There is no distinction as between a *municipal corporation*, and any other corporation or any natural person, where there is willful neglect of duty.

It is a question of *default* only.

Seagraves v. *City of Alton*, 13 Ills., 366.

Authorities:

County of Madison v. *Bartlett*, 1 Scam., 67.
County of Pike v. *Hosford*, 11 Ill., 170–76.
La Salle County v. *Simmons*, 5 Gilm., 513.
City of Pekin v. *Reynolds*, 31 Ill., 530.
City of Chicago v. *The People*, 56 Ill., 327.
City of Chicago v. *Wheeler*, 25 Ill., 396.
City of Chicago v. *Wheeler*, 24 Ill., 105.
Trustee—Bourland v. *County of Peoria*, 16 Ill., 546.

The above are on the Interest Question.

On the Question of Condemnation, the following authorities are cited:

Was it land or money?

Durando v. *Durando*, 23 N. Y., 331.

Story's Eq. Jurisp., §§ 1214, 1216.
City of Chicago v. *Palmer*, 93 Ill., 125.
Cook v. *So. Pk. Com'rs*, 61 Ill., 121.
Mitchell v. *I. & St. L. R. R. Co.*, 68 Ill., 288.
The People v. *Williams*, 51 Ill., 63.
The People v. *McRoberts*, 62 Ill., 38.
Rockford, R. I. & St. L. R. R, Co. v. *Coffinger*, 66 Ills., 510.
Ill. & St. L. R. R. Co. v. *McClintoch*, 68 Ill., 296.
City of Chicago v. *Barbian*, 80 Ill., 482.
County of Madison v. *Bartlett*, 1 Scam. 67.

Is the county bound to pay interest on county orders, from the day of issuing until paid?

Ex Contractu.
County of Pike v. *Hosford*, 11 Ills., 176.

Hosford refused to receive certain county orders "unless "they were payable with legal interest."

Cites, *County of Madison* v. *Bartlett.*

Held, that counties are not liable to pay interest on their contracts, except in pursuance of an express agreement to do so.

Ex Contractu.
City of Pekin v. *Reynolds*, 31 Ill., 530.

Action on a coupon of a bond. Declaration not sufficient, also:

Held, that the coupon did not bear interest.

The court say: "It seems to us that all the reasons "why a State or county should not be liable for interest, "apply with equal force to a city or town."

Ex Contractu.
City of Chicago v. *The People*, 56 Ills., 327.

Mandamus to compel the payment of claim for work under a contract with the City.

No express agreement to pay interest.

Cites *Pekin* v. *Reynolds.*

Ex Contractu.

La Salle County v. *Simmons*, 5 Gilman, 513.

This was an action of debt brought to recover money back which the plaintiff had been compelled to pay by undue advantage taken of him by the county commissioners in granting a ferry license.

Held, that interest can be recovered *of the county* under this case.

"The plaintiff was deprived of the use of his money "without his fault, and he ought to receive compensation "by the allowance of interest in the way of damages."

This case is commented on by the court in the case of *County of Pike* v. *Hosford*, 11 Ill., 176, and approved and distinguished from the cases purely EX CONTRACTU.

Where the defendant *fraudulently obtained* or *wrongfully detained* the money of the plaintiff, he is chargeable with interest from the time of his so obtaining or detaining the same.

Wood v. *Robbins*, 11 Mass., 504.

Interest is recoverable against a man, who receives the property of another and holds it against his consent.

Commonwealth v. *Crevor*, 3 Binney, 121.

Also on money received for property wrongfully converted.

Chaney v. *Yeates*, 1 N. H., 151.

And *against a person intrusted with the collection of money who converts it to his own use* from the time it ought to have been paid over.

People v. *Gashville*, 9 Johns, 71.

When money is obtained by fraud or deceit, and the party injured waives the tort and brings his action on the implied promise to return it, interest may be allowed as damages.

Selleck v. *French*, 1 Conn., 32.

SAVAGE, C. J., in:

Reid v. *Renssellaer*, 3 Cowen, 393.

Bourland v. *County of Peoria*, 16 Ill., 546.

This was a bill in chancery against the County of Peoria.

The county twice sold the same lots.

The COUNTY was here treated as *trustee* for money received on sale of lots which the county wrongfully sold and received payment for, and it, the county, was decreed to pay the money to the first *vendee, with legal interest.*

Thus it appears that the *two* cases of

La Salle County v. *Simmons*, 5 Gilm., 513,

and of

Bourland v. *County of Peoria*, 16 Ill., 546,

treat municipal corporations in regard to a DISCHARGE of a DUTY, in the same way as the law would treat a natural person, as respects the liability for damages in the nature of interest.

Any other doctrine would be most contrary to "*public policy.*"

City of Chicago v. *Wheeler*, 25 Ill., 478, applies the Statute of Illinois on Interest to the municipal corporation of the City of Chicago.

City of Chicago v. *Wheeler*, 24 Ill., 105.

In an action on the case to recover for an injury to property, resulting from the *negligence* of the defendant, it is proper to allow the plaintiff interest from the time the injury was done.

Chicago & Northwestern Railroad Company v. *Shultz*, 55 Ill., 421.
Bradley v. *Geiselman*, 22 Ill., 494.

§ 2. Int. Law of 1845, R. S., p. 614, (Hurd): Creditors shall be allowed to receive at "the rate of 6 per cent. per "annum * * * * * on money received "to the use of another, and retained without the owner's "knowledge, and on money withheld by an unreasonable "and vexatious delay of payment."

Now it is contended by the appellant that a municipal corporation is not within the meaning of this statute, for the reason that such corporations are not expressly named, and public policy and the nature of obligations of the municipal body exclude them from the operation of the statute.

The cases decided by our Supreme Court on this point and relied on for this exemption of municipal corporations are:

County of Madison v. *Bartlett*, 1 Scam. 67.
County of Pike v. *Hosford*, 11 Ill., 176.
City of Pekin v. *Reynolds*, 31 Ill. 530.
City of Chicago v. *The People*, 56 Ill., 327.
City of Chicago v. *Alcock*, 86 Ill., 384.
So. Park v. *Dunlevy*, 91 Ill., 54.

Now, the true ground on which to place this exclusion of municipal corporations from the operation of a part of the interest law is, that they are exempt from liability to interest on the ground of "*public policy*," and as matter of *construction*, since such corporations are essentially different from natural persons and from *corporations for profits*, and since further they, municipal corporations, are not ex-expressly named, it may well be held that all of the provisions of the interest statute do not apply to such munici-

pal corporations, but some of its provisions, nevertheless, do apply to municipal corporations.

We do not wish to *question* the propriety of this construction, but we maintain that the same law of "*public policy*" requires that municipal corporations shall be quickened to the performance of public duties under the law, by the spur of damages in nature of interest, the same as natural persons; and like individuals they must be held to good faith, honesty and discharge of duty, and as the law gives a broad and equitable construction to the statute in all cases to further the ends of justice, and it will do so equally as much in cases pertaining to municipal corporations, as in cases affecting persons only.

All cases of trusts, torts, *tortious* breaches of contract and tortious neglect of duty, and of fraud come within the statute, no matter what the nature of the corporation or person is. We are not to give immunity to municipal corporations and a premium upon fraud or neglect, by enabling them to obtain money or property without just compensation and full return.

But fortunately for the case at bar, we are not without a guide in the repeated decisions on this subject, *i. e.*, the cases of

Bourland v. *County of Peoria*, 16 Ill., 513.
LaSalle Co. v. *Simmons*, 5 Gilm., 513.
City of Chicago v. *Wheeler*, 25 Ill., 396.

When guilty of gross (neglect) misconduct in withholding money, the trustee is to be charged with interest with annual rests instead of simple interest.

Ogden v. *Larrabee*, 57 Ill., 389.
Hurd v. *Goodrich*, 59 Ill., 450.
In Re. Steele, 55 Ill., 322.

The judgment of the Circuit Court upon appeal from the commissioners' assessment of damages, on condemna-

tion of land for right of way, under the act of 1852, will draw six per cent, per annum interest, WHERE POSSESSION *of the property is taken and retained by the applicant for condemnation.*

Ills. & St. L. R. R. Co. v. *McClintock*, 68 Ill., 296.
Cook v. *So. Pk. Comrs.*, 61 Ill., 115.

In *Sammis* v. *Clark*, it *was held* that no circumstances appeared, tending to show that there was anything vexatious in the delay of payment, such as would allow the plaintiff to recover *interest* on open account.

13 Ill., 544.
13 Ill., 592.
14 Ill., 155.
16 Ill., 205.
16 Ill., 403.
51 Ill., 170.
Myers v. *Walker*, 24 Ill., 137.

Just compensation under the *constitution* includes *interest* as *damages*, where there is unreasonable delay, or where there is intentional and tortious breach of duty, to collect and pay over.

If therefore $10,000 was just compensation on the 5th of October, 1868, would it be just compensation after June 1, 1869, unless interest from the latter time until payment, be added?

The law regards six per cent. per annum as the lawful compensation — *just compensation* — for money withheld; the city on the 1st day of June, 1869, had done everything to deprive the owners of their land except to pay the money.

On the 1st of June, 1869, the RIGHT of the owner to have his money was *perfect*, and the *duty* of the city to

pay was perfect, from that moment all delay on the part of the city was UNREASONABLE AND TORTIOUS in such a case.

VI.

The reasonable presumption is that the City had all the money in the treasury.

There is no evidence, no proof, and no averment that the City did not have the money in the treasury for this assessment, on or about June 1, 1869; as it was the duty of the City to have it there at that time, it is presumed it did have it there—hence, it being merely there in trust for the owner as a special deposit, any withholding of it would be a *tortious* act, and so *unreasonable* and VEXATIOUS delay within the meaning of the 2d clause of the interest statute.

In May (13th), 1872, the City professed that it had then and had theretofore, collected the money: but it did not then pay over the money although it *was then demanded*, frequently.

It then had the money for some time, and it was at this trial incumbent upon the *defendant* to show when it first got the moneys if it would for any cause excuse its non-payment before that time—before actually receiving the money.

When shall we *presume* that, in *the absence of all evidence on the subject* that it (the city) first had or got the money?

The law presumes that the City was honestly and legally discharging its duty. It paid out $20,000 in May, it paid out $6,000 June 5, 1869, to Dr. Boone, and it *does not appear but that it had enough money to pay the remainder of the damages at that time.*

The ALLEGATION of the bill is that the city has UNREA-

SONABLY and VEXATIOUSLY withheld the money from June 1st, 1869, hitherto!

The only denial is, that plaintiff is not entitled to the fund.

The City then had the money.

The City was TRUSTEE of this fund.

It rests entirely with the city to show when she collected and how she disposed of the assessments.

County of Madison v. *Joseph Bartlett*, 1 Scam., 67.

Is a *county* bound to pay interest on county orders, from the day of issuing until paid?

Bartlett held sundry county orders, in form like this:

"Sept. Term of the Commissioners' Court. 1822. Or-"dered that David Sweet be allowed $8 for eight days' at-"tendance, as constable, upon the Circuit Court of Madison "County, at May Term, 1829, as per order of the Circuit "Court. Attest, Joseph Conway, Clerk."

And another, like this:

"December Term of the Commissioners' Court for Mad-"ison County, 1825. Ordered that William Moore be al-"lowed the sum of one dollar, or its equivalent, in State "paper, for services as a judge of a special election last "month, as per voucher filed. Attest, Hail Mason, clerk."

Says the court: "When State paper was worth, when "the order issued, only one-third of a dollar, is the county "bound, in discharge of such order, to pay three dollars in "money, and interest on three dollars, from the date of the "order until paid?"

Says the court: "At the *common law*, interest is the con-"sideration or price that is AGREED between parties to be "paid for the use of money for a stipulated time. At *com-*

"*mon law, if no agreement for interest* be made, it cannot "be recovered, *although the payment of the debt should be* "*unreasonably delayed.*"

The court cite case of *Challie* v. *Duke of York*, 46 Geo. III., (p. 55), to show that at common law, interest could not be recovered for wine sold and delivered, or for money due on an account stated.

Then says the court: "To remedy this defect of the "common law, interest is given by statute in certain speci- "fied cases, from the time that the debt becomes due, until "payment is actually made. Hence the statute interest "may properly be defined to be THE LEGAL DAMAGES, *or* "*penalty*, FOR THE UNJUST DETENTION OF MONEY."

The court then points out that these orders only fix the *amount* to be paid, and do not fix the *time* of payment, and from the nature of the duties and powers of the corporation known as the county, could not fix the *time* of payment. It could only pay when it had the money, and it appeared in this case that the county did not have the money.

The law does NOT IMPUTE laches, or even improper conduct to a State or county, and hence it will not *presume* that the county has not done every thing within its power to enable itself to comply with its contracts and duties. Nor will the law inflict a penalty, or give damages against a county for not paying its debts, *when* it is manifestly out of its power to do so. Counties are limited corporations, and can only levy a tax to a limited amount. When the law gives a penalty or damages against a corporation, or even against an individual for the non-performance of a given action or duty, it is done to stimulate and quicken the performance of a reasonable and possible thing.

And the holders of these county orders presumably knew the financial condition of the county, and may be presumed

to have consented to receive the payment of their claims whenever the revenues of the county would enable it to pay its debts. "If this is a reasonable presumption, and it "seems to be, then the *time of payment* of these county "orders did not arrive until there was money in the treas- "ury to pay them, and provision is made by statute to pay "orders according to their seniority."

This case then so far as the reasoning goes, is in favor of allowing interest in the case at bar; for the case then before the court above referred to—showed no money in the treasury, and *no duty* to have it in the treasury, and no laches or misconduct was alleged or presumed on the part of the court, and the court place the absence of liability on the ground, expressly, that no *time* was in any way to be inferred as a day of payment, until sufficient money was actually in the treasury to pay orders according to their seniority. In the case at bar it is insisted a duty to collect the money within a certain reasonable time existed, and that there was material delay and witholding of the money. So far as authority for the appellant in this case is concerned, the case of *Madison County* v. *Bartlett*, may be laid out of consideration.

The case of the *County of Pike* v. *Hosford*, 11 Ills., 176, decides merely that counties are not obliged to pay interest on their contracts in the absence of an express agreement to do so, and that county orders do not bear interest unless expressly stipulating to do so.

Court cite the case of *Madison County* v. *Bartlett*, and say that "it decides that counties are not bound "to pay interest on county orders, in the absence of an ex- "press agreement to pay it." And that is all it decides.

The case of *LaSalle County* v. *Simmons*, 5 Gilman, 513, says the court, is clearly distinguished from the case of *Madison County* v. *Bartlett*.

The former case, like the present (*i. e.*, *County of Pike* v. *Horsford*), arose out of a contract made with a county in the course of its legitimate business transactions; and it is held, that the county was not to be charged with interest, in the absence of an agreement to pay it. In "the "latter case, the county had, without authority of law, or "color of right, obtained the possession of money belonging to Simmons, and detaining it against equity and good "conscience, it was required to make compensation for the "injury inflicted on Simmons, by the payment of interest, "in the way of damages. The conclusion to be drawn "from this decision is, that counties do not pay interest on "their contracts, except in pursuance of an express agree-"ment to do so; *but that in actions originating in torts*, "*they are liable to the same extent as private persons.*"

In 1863, the case of *City of Pekin* v. *Reynolds*, 31 Ill., 530, arose. It was an action of debt against the city of Pekin on an over-due coupon for interest on a bond of the city of Pekin, and it was held that, as there was no averment of a demand upon the city treasurer for payment of these coupons, that even if such instruments could, in any event, draw interest without an express agreement, it could only be after a proper demand of payment, and that "un-"til a demand is made, such a body is not in default. They "municipal corporations) are not like individuals, bound to "seek their creditors, to make payment of their indebted-"ness."

The declaration was held insufficient to warrant a recovery. Then the court enlarges somewhat, after having decided the case, and cites with approval the case of *Madison County* v. *Bartlet*, 1 Scam., 67 (cited above), placing it on the ground that corporations with limited powers must be presumed to employ all their means to cancel their indebtedness, and the court say that the reasons why a State

or a county should not be liable for interest apply with equal force to a city or town.

"Their indebtedness, in the absence of express agree-"ment, does not bear interest." The next case that arose was the case of *City of Chicago* v. *The People*, 56 Ill., 327. This case cites the case of *City of Pekin* v. *Reynolds*, and puts the rule solely on the ground of absence of express agreement, in which case a municipal corporation is not bound to pay interest on contracts.

This is all satisfactory to us, and it is nowhere, in either of these cases above referred to, intimated by the court that a municipal corporation is not bound equally as much as individuals to exercise honesty and good faith towards its creditors; nor is it laid down that a neglect of DUTY by a municipal corporation to collect the money for, and pay over upon a just debt, will not subject the defaulting corporation debtor to a liability to pay interest on such debt, provided the legal duty to collect with diligence exists.

No express contract to pay interest is averred in the case at bar, nor is any such contract relied on as the basis of such a liability—the ground of liability is a wrongful neglect of duty to the damage of the plaintiff. The *means* of collecting the money were amply provided by law—the time within which it was to be collected was fixed by law, and *no excuse* for not collecting it is set up in the pleadings or shown in the evidence; on the contrary the allegations of the bill are of negligence and utter disregard of its duty on the part of the City of Chicago to proceed within a reasonable time to collect and bring into the treasury the funds with which to pay the award, and averment of adequate means of raising the money and of the duty to raise and collect it within a reasonable time. The neglect of duty is shown as matter of fact, when the duty is shown to exist to raise the sum and it is shown that the money was not raised, the

only question then is what was a "reasonable time" within which to proceed to collect the money and have it in the treasury. A *demand* was made, by the parties seeking their money, in May, June and July, 1869, and many times thereafter of the proper city officials; hence the case is different in that respect, as well as in the other respect which I have pointed out, from the case of *City of Pekin* v. *Reynolds.*

Is it not indulgence enough to the municipal corporation to allow so much time as would be convenient and necessary, provided the collector had proceeded at once with due diligence to discharge his duty; he received the warrant into his hands commanding him to make this money, on the — day of October, 1868, he could have, by reasonable diligence, collected the money.

City of Chicago v. *Wheeler*, 25 Ill., 396.

The money having been awarded—the assessment being made, returned, and confirmed—the property condemned for the street became that of the City for public use, (subject to the rights of the owner, till he received just compensation,) and the city became debtor of the former owner to the amount of the damages reported, and allowed by the city on the confirmation of the report, and this sum so justly due, the city was bound to pay within a reasonable time.

The legislature has clearly indicated that a delay of more than two years is unreasonable, and after the expiration of that time the party is entitled to receive interest on his damages.

In the case at bar the warrant was received by the collector in October, 1868, but the final confirmation of the assessment was on the 24th day of October, 1868, and for two years thereafter the law gave a lien upon all property assessed for benefits. So two years, in the contemplation of the legislature, was ample time in which to collect the assessments and pay the damages.

The cases of the *City of Chicago* v. *Wheeler*, and *City* v. *Bonner*, 25 Ill., 396, were decided by the Supreme Court of Illinois, in 1861, and one of the principal errors assigned as cross error, was that the court below had denied interest, and the Supreme Court reversed the decree below for this sole error, and entered judgment for the damages, with interest, in the Supreme Court.

Now, these cases were decided, with the cases of *County of Madison* v. *Bartlett*, 1 Scam., 67, and *County of Pike* v. *Hosford*, 11 Ill., 176, before the court, and yet these two cases were not regarded by the court as authority for denying interest to the creditor who was unjustly delayed in receiving payment.

And then when the cases of *City of Pekin* v. *Reynolds*, 31 Ill., 530, and *City of Chicago* v. *The People*, 56 Ill., 327, came before the court, there was no suggestion of error in the *Wheeler* case; it was not thought for a moment that the case of Wheeler was not good law, for the reason that there is no conflict whatever between these cases; they professedly stand on different principles. One principle is that a municipal corporation shall not be held as liable to pay interest on its contracts *as such*, in the absence of express agreement. This is the whole of the doctrine; nothing more; and yet at the same time the cases say that municipal corporations are bound to exercise good faith, due diligence, and common honesty, as much as individuals; and in cases partaking of fraud, breach of trust, torts, and in cases of unusual and vexatious delay, municipal bodies are not shielded under any corporation immunity, and they are as much within the policy of the statutes of interest as natural persons. See the language of the following cases expressly to this effect.

In the case of *County of Pike* v. *Hosford*, 11 Ill., 176, the court lays it down as an established doctrine that

counties, in actions originating in torts, are liable to the same extent as private persons.

The case of *La Salle County* v. *Simmons*, 5 Gilm., 513, holds directly that the *County* of La Salle was bonnd to pay interest on a sum of money which it had illegally exacted from the plaintiff, and no suggestion is made in the case, that a municipal corporation is entitled to any greater immunity than a natural person under such circumstances.

This was a case where the county wrongfully sold certain lots TWICE, and received payment for the second purchaser, and was compelled to account to the first purchaser for the consideration received from the second vendee, and to pay over the money so received with INTEREST to the first vendee; the point of this decision is that same rule as applicable to a natural person who is treated as trustee of moneys wrongfully obtained, and for which he is chargable with *interest*, is applied to a municipal corporation.

There is no dispute, but that when a trustee is guilty of gross misconduct in withholding money, the trustee is to be charged with interest, and in the cases next below cited with interest with annual rests, instead of simple interest.

Ogden v. *Larrabee*, 57 Ill., 389.
Hurd v. *Goodrich*, 59 Ill., 450.
In Re Steele, 65 Ill., 322.

But it is decided as we have shown above, that the same equitable principle in case of misconduct for charging interest, as damages against a municipal corporation applies as against a person.

The City of Chicago is not made answerable *for its neglect of duty* in this case by simply being made to pay the amount of the AWARD—*that* it is bound to pay at all events; *the neglect of duty* imposes a further and additional

liability, for it brings upon the complainant a new kind of damage.

Six per cent. interest is the legal measure of this damage.

"It became the duty of the common council to make "competent provision for the support of paupers within "the city. But a failure on their part to perform the duty "will not absolve the corporation from responsibility. "When the law imposes an obligation on a corporation, "which it refuses to discharge, it may be held liable, civilly, "at the suit of the party who sustains damages in conse-"quence of its refusal.

"In legal contemplation, a corporation assumes to per-"form what its charter enjoins upon it, and it is subject to "answer in a proper action for its default. And the law "is well settled, however it may have been formerly, that "an action of assumpsit may be maintained against a cor-"poration upon an implied contract."

Seagraves v. *City of Alton*, 13 Ill., 366.
Chicago v. *Wheeler*, 24 Ill.

In Seagraves' case, the jury were instructed that the plaintiff could not recover of the corporation, defendant, unless the services were rendered in pursuance of an express contract with the corporation. This was and is held to be erroneous.

The *absolute legal obligation existed to pay over the money in the case at bar*, within a reasonable time, at all events, on demand, and *immediately* on demand, after it was collected; HENCE, a withholding of it for a day was a tortious act, was an unreasonable and vexatious delay—was an unlawful *conversion* of the plaintiff's money to the defendantss' use; like the case of an attorney who has collected money of his client, and refused to pay it over on demand. Such an act passes with *impunity*, and *uncensured*, and even approved

by the law, unless the party in *default* is made to respond in damages in the nature of interest.

A municipal corporation is not presumed to be in default by *the simple non-payment* of money on its contracts. HENCE, interest is not demandable in the absence of express agreement of its part to pay interest; but there is no case in the books where a municipal corporation is permitted to retain money belonging to another after demand *without interest!*

And there is no case in the books where a municipal corporation is allowed to neglect its duty wilfully, and the absence of a sufficient excuse *implies a wilful neglect*, and here *no excuse is shown*, but there is an attempt to make gain by exemption from paying interest on the just demand which existed against it.

It is not the case of a contract to pay a sum of money, and a delay in payment by reason of want of the money on hand to pay it with.

This case is entirely distinguishable from such a case of contract, and present inability to perform, it is a case of misfeasance, or non-feasance, of a perfect legal duty.

The ability to get the money existed; the duty to have it existed; the neglect to get it, and the failure to have it, were tortious acts, disregard of duty--a public duty—imposed by law.

The obligation of payment of money on a contract merely is not a DUTY in that sense; that is, a contract merely —purely a contract. One is a promise merely; the other is *misfeasance*, on which a promise is implied in the law for the purpose of supporting an action of assumpsit, but it is a legal fiction. The obligation arises from the DUTY, or obligation imposed by law.

It is held that it is not right that the party causing

or contributing to the delay should be allowed interest. (61 Ill., p. 124.) Nor, is it right that after the city has succeeded in getting into possession it should then cause delay, and yet escape payment of interest? And the reason is the same in each case, that no man ought to be allowed by law to take advantage of his own wrong.

That the city was in possession was, and is, and ever remains a stronger reason for compelling it to pay interest. The proceedings were then after payment of part, and after taking possession, absolute and final, and so no delay was permissible.

Did the plaintiff ever cause or contribute to the delay? Did Boone, or Burner, or Insurance Company or Gregory ever cause or contribute to the delay in payment? No.

Then whose act was it?

Cook v. *South Park Com'rs*, 61 Ill. 125.

"We think that interest should be allowed upon judg-
"ments, when final, in proceedings of this character. *They*
"are within the spirit if not in the terms of the statute,
"which allows interest upon all *judgments* recovered."

Cook v. *South Park Com'rs*, 61 Ill., 125.

The proceedings under the *law* of *June 22, 1852*, (R. E. Statutes Vol. 2, p. 1522.) for the exercise of the right of eminent domain in acquiring the right of way for railroads, in this State, are *essentially* like the proceedings in the case *at bar*.

1. In each case the damages are awarded by *Commissioners*.

(*a.*) Under the City Charter the Board of Public Works were *ex-officio*, the commissioners designated by the Act of the Assembly.

(*b.*) In the case of proceedings to acquire right of way

for railroads under the Act of June 22, 1852, the commissioners were appointed by the Circuit Court on petition.

(*c.*) But in either case, the *tribunal* making the award were mere *ministerial officers*, possessing no greater power in one case than in the other.

(*d.*) Under Sec. 6, of the said Act of June 22, 1852, the commissioners make report of the *damage* allowed to the owner of the *land to be taken*, by reason of the improvement, and present a copy to such of the parties interested, and file a copy with the clerk of the commissioners in whom the proceeding originated.

(*e.*) In the case of the City Charter the commissioners make their assessment and award, and file a copy in the office of Board of Public Works, and a copy in the city clerks office, all for public uses.

(*f.*) In the case of the Act of 1852, the award may be appealed from to the Circuit Court, but if no appeal is taken the award as reported shall be conclusive upon the parties, "and the right and title" of the land so vests in the State, county, corporation or person in whose behalf the proceeding is had, with the right to enter upon same, and apply the same according to the prayer of the petitioner, and the right and title, &c., shall vest in, &c., *upon the payment* of the compensation or damages so assessed with the right to enter upon and use, &c.

(*g.*) So in the case of the City Charter, an *appeal may* be taken from the award of the commissioners to the Circuit Court; but if no appeal is taken, then the award is conclusive and final, but the land shall not be actually appropriated or taken until the compensation is paid.

(*h.*) Now, in neither case is there a judgment of a judicial court of record, *necessarily* — and no such judgment unless there is an appeal to the court:

But in either case, there is a *final award* — and on *awards* interest may be allowed at 6 per cent. per annum, provided possession is taken thereunder.

City of Chicago v. *Palmer*, 93 Ill., 125.
Ill. & St. L. R. R. Co. v. *McClintock*, 68 Ill., 296.
Cook v. *So. Pk. Com'rs*, 61 Ill., 125.

Construction of statutes:

The rule for the construction of statutes is thus laid down in chapter 131 R. S. Illinois, § 1:

"*First.* All general provisions, terms, phrases, and expressions shall be liberally construed in order that the true intent and meaning of the legislature may be fully carried out.

"*Fifth.* The word "person" or "persons" *as well as words referring to, or importing persons, may extend and be applied to bodies politic and corporate, as well as individuals.*"

"Creditors":

§ . "Creditors shall be allowed to receive at the rate of six per cent. per annum for all moneys after they become due, on any bond, bill, promissory note, or other instrument of writing; on money lent or advanced for the use of another; on money due on the settlement of account, from the day of liquidating accounts between the parties and ascertaining the balance; on money received to the use of another, and retained without the owner's knowledge, and on money withheld by an unreasonable and vexatious delay of payment."

§ 3. SEE ALSO § 3.

When, in the exercise of eminent domain, a municipal corporation has taken all the preliminary steps to acquire the land sought to be appropriated for a public improve-

ment, and sufficient time to collect the money to pay for the same, provided due diligence had been used to make the collection, has elapsed, and nothing remains but the absolute legal duty to pay the "just compensation" or damages awarded, and *then* the municipal corporation takes possession of the land for the public use and to make the improvement, *from that moment of possession, interest begins to run on the amount of the award.*

Ill. & St. L. R. R. Co. v. *McClintock*, 68 Ill., 296.

Cook v. *So. Pk. Com'rs*, 61 Ill., 115.

And this will be allowed as part of the just compensation, even though the possession is tacitly permitted by the owner or he licenses such possession. For the law will not drive the owner to a breach of the peace to protect his possession, nor drive him to an action of trespass, or ejectment, but, at his option, will permit him to consider the interest as just compensation for the use of the land.

Smith v. *C. A. & St. L. R. R.*, 67 Ill., 195.

Constitution of Illinois, 1848, Art. 13, § 11: "Nor shall "any man's property be taken or applied to public use "without the consent of his representatives in the general "assembly, nor without just compensation being made to "him."

1848. Art. XIII. § 6. "The right of trial by jury "shall remain inviolate, and shall extend to all cases at law, "without regard to the amount in controversy."

1848. Art. XIII. § 12.—Nearly same as follows:

1870. Art. II. § 13. "Private property shall not be "taken or damaged for public use without just compensa-"tion, such compensation, when not made by the State, "shall be ascertained by a jury, as shall be prescribed by "law."

Art. II. § 19. "Every person ought to find a certain "remedy, in the laws for all injuries and wrongs which he "may receive in his person, property, or reputation; he "ought to obtain, by law, right aud justice freely, and "without being obliged to purchase it, completely and "without denial, promptly and without delay."

VII.

On pages 29 and 30 of appellants' brief, the point is made that by the authority of the *Wheeler* case above cited, the fact that the city charter of 1863, allowed a new assessment at any time within *five* years after the confirmation of the original assessment, if from any cause the city should fail to collect the whole or any portion of any special assessment,—that such fact shows that interest can only be allowed from the expiration of five years.

This is an untenable position. Suppose it allowed twenty years, or provided expressly that there should be no limit to the right of new assessment, would this be an allowance to take the benefit of the condemnation and all the land without paying interest? By no means, the reason of the Wheeler case is just to the contrary. It is that reasonable diligence to collect must be used. In that case the court said it was clear that any delay beyond two years was unreasonable, and that by cutting off the means of getting the money by the assessment after that time, it was a legislative limit to indulgence; but does it follow that the legislature meant that the indulgence should be unlimited, if the right to collect were indefinitely extended? The right to interest does not depend upon this provision of the law in any respect.

VIII.

Appellants' brief from page 8 to § 2 on page 20, is taken up with the attempt to prove the two following positions to be true at one and the same time:

1st. That by the sale of the land (*i. e.* the premises subjected to the condemnation proceedings,) by the trustee Boone under the foreclosure to the insurance company, the debt of Bruner was paid to the insurance company.

Appellant says: "The company, by its purchase at the "trustees' sale, merely became the owner of such title to "the premises * * * as the trustee had acquired by "the trust deed from Bruner."

"This was all the trustee was authorized to sell, and all "he did sell." And then appellants' counsel says the company sold the same to Tebbets, (appellants' brief, p. 20), and the counsel argues correctly enough that the *sale of the land* to the company cancelled the Bruner note.

This is all well, but what next?

2d. Having proved the foregoing, (and it is correct in fact, and in law) counsel says: "the fee" of the land, "be-"came vested in the city by virtue of the condemnation "proceedings, &c., *the company had no longer any interest* "*in the land* and *nothing* passed by the deed from Boone, "the trustee, to the company." This is reiterated in various ways.

The first proposition is true as I have said, and if true it excludes the second proposition, either the title of the land passed or it did not pass, by Boone's deed to the company. As the logicians say, the doctrine of the excluded middle comes in here. If it did pass, then it was also conveyed to Tebbetts, and Tebbetts as owner, either legal or equitable, is entitled to the condemnation money.

If the title did not pass by Boone's deed to the company, then it was because it was already vested in the city, but in such case, the party divested of the title, or his or its assigns becomes entitled to the condemnation money, and this not by virtue of any voucher, but by virtue of the equity of the case, as well as the express language of the city charter. (See bottom of p. 10, and top of p. 11 of appellant's brief, for charter provisions.)

It needs no authorities to show that the mortgagee is an "owner" in the sense of that word in the charter provision. There is no force in the voucher, so called. Such a paper as that shown in evidence is unknown to the city charter, it was a mere memorandum of the money account, not a contract that bound the city, but an evidence of a fact; it was not a promise to pay money, and of itself gave no right to its holder. The evidence of right to the money was to be furnished by an abstract of title. (See charter on p. 11 appellants' brief.)

That the voucher had no validity as a contract, in the opinion of appellant, see the answer of the city of Chicago set out on page 12 of Transcript Sec. 1.

The rights of the parties, here, grow out of the ownership of this land.

Now it is not a correct position to assume as counsel do, that the condemnation proceedings divested title—such proceedings were merely initiatory to the compulsory sale under eminent domain—the constitution of 1848, as of 1870, provided, that private property shall not be taken or damaged without just compensation. The "compensation" is money *paid*, or its equivalent *paid*. (See *Cook* v. *South Park Commissioners*, 61 Illinois, 120), where this is decided.

But counsel point to the expression in the 15th section of the charter, set out on page 11 of appellants' brief:

" In all cases the title to land taken and condemned in " manner aforesaid, shall be vested completely in the city, " in fee simple."

This means, that where the condemnation proceedings are regular, and the land has been taken, and appropriated, the fee vests — not an easement, but the fee. But this declaration does not make title pass. It has been held that such a construction is unconstitutional.

Cook v. *South Park Coms.*, 61 Ill., 120, &c.
Chi. & Mil. R. R. Co. v. *Bull*, 20 Ill., 218.
Johnson v. *Joliet & Chi. R. R. Co.*, 23 Ill., 203.
Shute v. *Chi. & Mil. R. R. Co.*, 26 Ill., 436.

And section 17 of the charter (see p. 11, appellants' brief), expressly provides, that when the damages shall have been paid, or in city treasurer's hands *ready to be paid*, the city may enter on and *appropriate* such property. *Then the title changes, and not till then.* This is the statute.

Weckler v. *City of Chicago*, 61 Ill., 142: " The constitu- " tion declares, that no man's property shall be taken or " applied to public use, without just compensation: Held, " this compensation must be pecuniary in its character, " because it is in the nature of a compulsory purchase. " Statutes authorizing municipal bodies to exercise the " right of eminent domain, must be strictly construed."

City of Chicago v. *Barbian*, 80 Ill., 482, holds that payment of compensation alone divests the title from the owner. There is no essential difference under the constitution of 1870 and 1848.

In the case of *City of Chicago* v. *Larned*, 34 Ill., 203, it was held, that the just compensation required by the constitution is a matter of substance, and not of form; and

a proceeding which ignores this fact will be invalid, and the case of *Rich* v. *The City of Chicago*, 59 Ill., 286, is clear authority, that the *condemnation* does not divest the title of the owner—it must be followed by just compensation made. A judicial proceeding only can divest title, and trial by jury, under the old and new constitution; but the law is, that compensation accepted, after condemnation, does divest title, &c. These principles are fundamental and obvious.

Now, having shown that the title did not become vested in the city, by these initiatory proceedings looking to a compulsory sale, merely, it follows that the title remained in Boone, and by *mesne* conveyances, came to Tebbetts.

The proposition of appellants, therefore, as set out on page 8 of counsel's brief, is refuted.

Now, as to the *fact* about who was entitled to the voucher, if there is any virtue in the voucher, as such, on page 38 of transcript of record, it appears, witness testifies that, he Gregory, gave the statement of the account called the voucher, to Boone, trustee; afterward Boone endorsed it over, and gave it to Tebbetts, when Tebbetts bought the land of the insurance company.

This is also stated by Boone. Counsel endeavors to make Boone, the witness, state legal conclusions in his testimony, but it appears that the simple fact is, Boone gave the voucher to Tebbetts, or to Gregory as agent for Tebbetts. (Pages 44 and 45 of Transcript of Record).

This is not contradicted. There is not a scintilla of evidence that Gregory had the slightest interest in the land or the voucher after May 14, 1869, (see Transcript pp. 37 and 38.) The court below held, and so decreed, that Gregory had no interest in either the one or the other, and that Tebbetts did hold the right to both.

It is evident that the city has never paid for the land to the owners, it paid for the equity of redemption, which was all that Gregory owned in 1869, and it paid enough more to pay off the $6,000 mortgage which Boone held, making $26,000, but it had never paid the *other mortgage* of $10,000 which Boone held, and now by sophistry of ratiocination it attempts to show that nobody is entitled to the money.

In conclusion we are now again brought to the interest question. Assuming that Tebbetts is entitled to the "just "compensation," as assignee of the title, we ask what is there legally or equitably to forbid his having interest on the condemnation money. He has lain out of his money; he has been deprived of the use of his land; the city has retained the money in its treasury and refused to pay it over, the city has had the use of the land. On which side lies the equity?

In the presentation of this case by the appellant, and in the legal argument there is a remarkable want of candor, on the part of appellant's counsel; and this is quite in harmony with the dishonesty of the corporation, in taking the land of a citizen for public purposes by proceedings *in invitum*, and then by every devise, and delay and pretence, and now by cobweb sophistries of argument, keeping that citizen out of his pay for the land, both of principal and interest. This conduct has nothing to paliate it. It is simply disgraceful. Observe what efforts the appellee and his grantor have made to get the money for this land; he asked the city of Chicago to pay that money—the balance of the money—asked the comptroller and the city attorney.

Mr. Gregory testifies (p. 38, § 95, Transcript of Rec.) Dr. Boone demanded his share of the money of the city of

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Mr. Gregory testifies (p. 38, § 95, Transcript of Rec.) Dr. Boone demanded his share of the money of the city of Chicago—and they paid him about the 5th of June, (1869) a part. I look upon the suits against the city as merely demands for compensation.

Again the witness states (p. 39 Trans. of Rec.) " As agent for Mr. Tebbett's after he had made this purchase from the city of Chicago repeatedly, I cannot state how many times, but a good many times, I have been to the comptroller of the city of Chicago to get the payment for this land; had an interview with a committee of the com mon council for the purpose. I made demands for the money in 1873, and every year since. I knew Dr. Boone in the summer of 1869, in June 1869, and again prior to his foreclosing the trust deed, repeatedly demanded the balance of the money from the city of Chicago."

This bill in equity is a demand, which has been resisted from first to last, without any show of legal or equitable defense—and then appealed for further delay. The conduct of the city deserves the severest censure.

Conclusion.

The appellee assigns cross errors. The interest should have begun to run from June 1, 1869. No deduction should have been made of the $820, or any other sum. The court below allowed interest arbitrarily from Dec 31, 1869.

There are, therefore, two errors to be corrected. We submit that the order should be to amend the decree so that the appellee should have it entered as of the date of 11th December, 1877, but increased by the additional interest between June 1 and December 1, 1869, and the additional sum of $820, erroneously deducted.

Respectfully submitted.

CHARLES A. GREGORY.

George Payson

Counsel for appellee

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~300.~~ 56

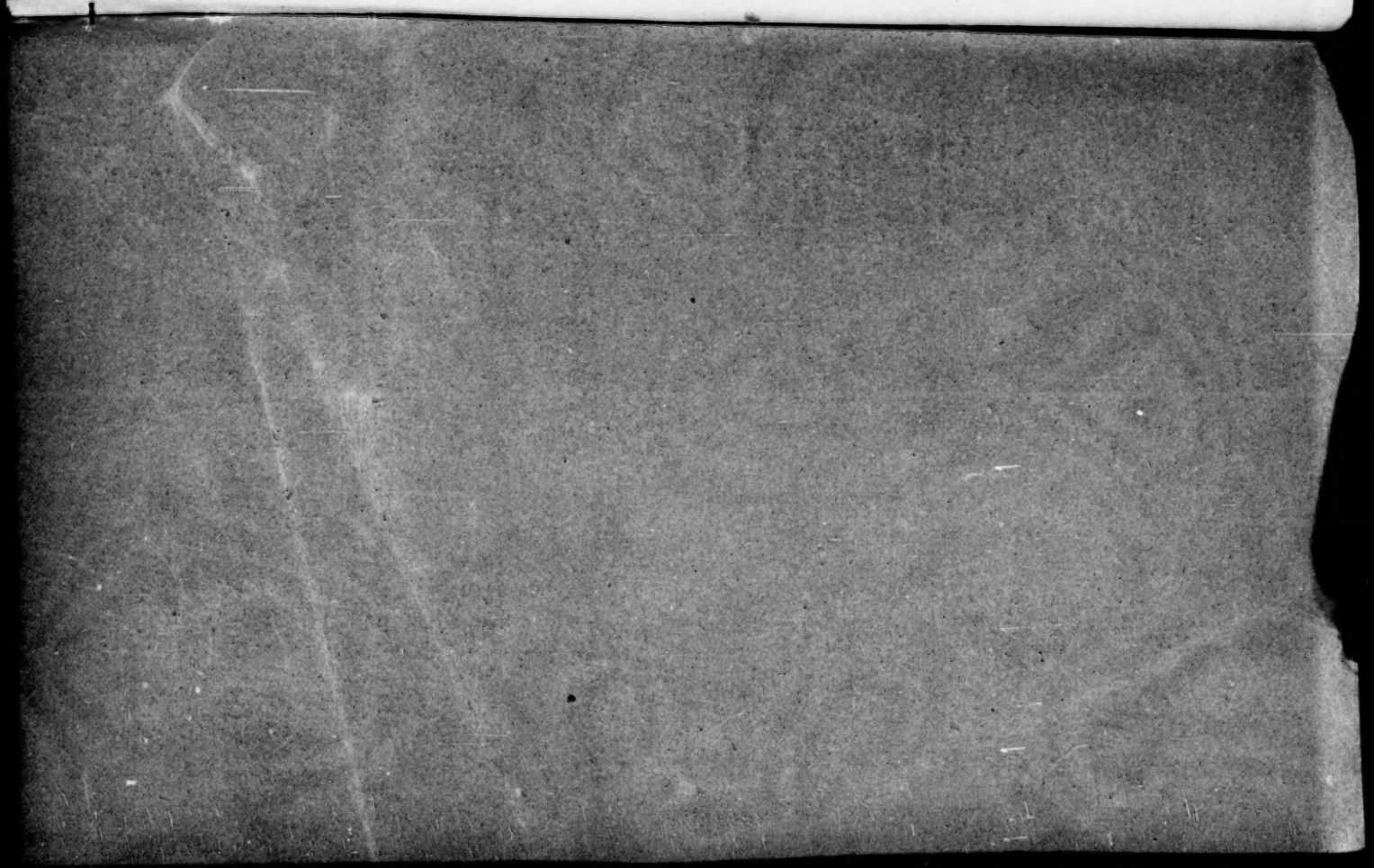
FRANCES H. BARTON, PLAINTIFF IN ERROR,

vs.

JOHN S. BARBOUR, RECEIVER OF THE WASHINGTON CITY, VIRGINIA MIDLAND AND GREAT SOUTHERN RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 19, 1878.



SUPREME COURT OF THE UNITED STATES.

No. 300.

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1 *Declaration.—Filed Feb.* 14, 1877.

In the supreme court of the District of Columbia.

FRANCES H. BARTON *vs.* JOHN S. BARBOUR, RECEIVER OF THE WASHington City, Virginia Midland and Great Southern Railroad Company.	At law.	No. 17278.

The plaintiff, Frances H. Barton, sues the defendant, John S. Barbour, as receiver of the Washington City, Virginia Midland and Great Southern Railroad Company, a corporation organized under a law of the State of Virginia, and doing business and having an office in the District of Columbia, for that the defendant on the 11th day of January,
2 1877, was running and operating a railroad through the State of Virginia, and upon said railroad the defendant was a common carrier of freight and passengers for hire.

That on the day and year aforesaid the plaintiff was a passenger in a sleeping car upon said railroad, and by reason of a defective and insufficient rail upon the track of said railroad the car in which the plaintiff was a passenger was thrown from the track and turned over down an embankment, and she was greatly hurt and injured and her bodily health permanently impaired; that the defendant did not use due care in regard to the said defective rail, and the injury to the plaintiff was occasioned by the negligence and carelessness of the defendant, but
3 the plaintiff used due care.

The plaintiff claims $5,000 damages.

By S. S. HENKLE,
Her Att'y.

The defendant will plead hereto on or before the first special term, occurring 20 days after service hereof, otherwise judgment.

S. S. HENKLE, *Att'y.*

4 *Subpœna to ans.—Issued Feb.* 14, 1877.

In the supreme court of the District of Columbia.

FRANCES H. BARTON, PL'FF, *vs.* JOHN S. BARBOUR, RECEIVER OF THE WASHington City, Virginia Midland & Great Southern Railroad Company, defendant.	At law.	No. 17278.

The President of the United States to the defendant, greeting:

You are hereby commanded to appear in this court on the first day of its special term, occurring 20 days after service of this writ on you, to answer the plaintiff's suit and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk.*
By J. R. YOUNG,
Ass't Clerk.

HENKLE.
REC. 300—1

5 *Marshal's return.—Filed Feb.* 14, 1877.

Served copies of the declaration, notice to plead, affidavit, and this summons on the defendant, John S. Barbour, the 14th day of Feb'y, 1877.

A. SHARP,
Marshal.

6 *Plea.—Filed Mar.* 6, '77

In the supreme court of the District of Columbia.

FRANCES H. BARTON
vs.
JOHN S. BARBOUR, RECEIVER W. C'TY, M. & G't R. R. Co. } At law. No. 17278.

And now come the defendant in his own proper person and says that the court ought not to have or take further cognizance of said action, because he says at the time of serving out & serving on him of said writ he was the receiver of all the real and personal property, right, privileges, and franchises of the said Washington City, Virginia Midland & Great Southern Railroad Company, under an order passed by the circuit court for the city of Alexandria, in the State of Virginia, in vaca-
7 tion, on the 13th day of July, 1876, in a cause therein depending on the equity side of said court of the style of John C. Graham, who sues for himself & others, vs. The Wash. City, Va. Midland & Great Southern Railroad Company et al.

That by said order or decree he was authorized to defend all actions that might be brought against him as such receiver by the permission of the said court; and that he should not in any case incur any personal and individual liability in the operation of said line of railroad, or otherwise in the premises, by reason of any act or thing done by him or his servants, agents or attorneys, the said receiver acting in good faith and in the exercise of his best discretion; but the property in his hands as such receiver should nevertheless be chargeable with any claim
8 which may be established against said receiver in any action brought against him by any person, under leave of the court first had and obtained.

That the plaintiff hath not had and obtained leave of the said circuit court for the city of Alexandria to bring and maintain this his action aforesaid.

And this the defendant is ready to satisfy. Wherefore he prays judgment whether this court can or will take further cognizance of the action aforesaid.

JOHN S. BARBOUR,
Receiver of the Wash. City, Va. Midland & Great Southern R. R. Co.

W. S. COX, KENT & NEALE,
Att'ys for Receiver.

9 *Demurrer.—Filed Mar.* 13, '77.

In the supreme court of the District of Columbia.

FRANCES H. BARTON
vs.
JOHN S. BARBOUR, RECEIVER, &C. } Law. No. 17278.

The plaintiff says that the plea is bad in substance.

S. S. HENKLE,
Att'y for Pl'ff.

The plaintiff will agree that the defendant is a common carrier, and as such liable to be sued outside the jurisdiction of the court which appointed herein, without leave of the court.

S. S. HENKLE,
Att'y for Pl'ff.

10 *Joinder in demurrer.—Filed Mar.* 17, '77.

In the supreme court of the District of Columbia.

FRANCES H. BARTON
vs.
JOHN S. BARBOUR, REC'R. } At law. No. 17278.

The defendant says that the plea is good in substance.

A. S. COX, KENT & NEALE,
Att'ys for Def't.

11 *Demurrer ordered heard in gen. term in 1st instance.*

JAN. 22, '77.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said District, commencing the fourth Monday, 22d day, of January, 1877, Chief Justice Carter presiding.

APRIL 14, '77.

Session resumed pursuant to adjournment, Chief Justice Carter presiding.

FRANCES H. BARTON
vs.
JOHN S. BARBOUR, RECEIVER OF THE WASH. City, Va. Midland & Great Southern R. R. Co. } At law. No. 17278.

The court orders that the plaintiff's demurrer to the defendant's plea be heard in the general term in the first instance.

12 *Note of issue.—April* 25, '77.

In the supreme court of the District of Columbia.

FRANCES H. BARTON
vs.
JOHN S. BARBOUR, RECEIVER, &C. } At law. No. 17278.

Last pleading March , 1877.
S. S. Henkle, att'y for pl'ff; W. S. Cox, Kent & Neale, att'ys for defendant; W. C. Cole of sup. court.

S. S. HENKLE,
Att'y for Pl'ff.

13 *Demurrer overruled.—Feb.* 8, 1878.

Supreme court of the District of Columbia, January 7, 1878.

Proceedings before the supreme court of the District of Columbia, in

general term, commencing Monday, January 7, 1878; present, Chief Justice Cart'er and Justices Wylie and MacArthur.

FRIDAY, *February* 8, 1878.

Session resumed pursuant to adjournment; present, Justices Olin, Humphreys, and MacArthur.

FRANCES H. BARTON, PL'FF,
vs.
JOHN S. BARBOUR, RECEIVER OF THE WASHington City, Va. Midland & Great Southern R. R. Co., defendant. } At law. No. 17278.

14 And now again come here as well the plaintiff as the defendant, by their respective attorneys; whereupon after argument of the cause upon the plaintiff's demurrer to the defendant's plea, ordered here for hearing in the first instance, because it appears to the court that the said plea is a good bar to the action, therefore it is considered that the said demurrer be, and the same is hereby, overruled, that the plaintiff take nothing by his suit, and that the defendant go thereof without day and recover against the plaintiff $ for the costs of his defense, and have execution thereof.

15 *Appeal bond fixed at* $500.

MONDAY, *July* 1, 1878.

Session resumed pursuant to adjournment; present, Presiding Justice Wylie and Justices Humphreys and MacArthur.

FRANCES H. BARTON
vs.
JOHN S. BARBOUR. } At law. 17278.

Comes now the plaintiff, by attorney, S. S. Henkle, and moves the court to fix the penalty of bond for appeal to the Supreme Court of the United States, and the same is hereby ordered fixed at five hundred dollars.

16 *Appeal bond.—Filed Oct.* 16, '78.

In the supreme court of the District of Columbia, the 16th day of October, 1878. In error.

FRANCES H. BARTON, PLAINTIFF,
vs.
JOHN S. BARBOUR, RECEIVER OF THE WASHington City, Virginia Midland and Great Southern Railroad Company, defendant. } At law. No. 17278.

Know all men by these presents, that we, Frances H. Barton and Saul S. Henkle, are bound unto the above-named John S. Barbour, receiver, &c., in the sum of five hundred dollars, to be paid to the said John S. Barbour, &c., his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators, firmly by these presents; sealed with our seals, and dated this 16th day of October, 1878.

Whereas the above-named Frances H. Barton has prosecuted her writ or error to the Supreme Court of the United States to reverse the judg-

ment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named Frances H. Barton shall prosecute her said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

SAUL S. HENKLE. [SEAL.]

Sealed and delivered in presence of—

Approved.

A. WYLIE, *Justice, &c.*

17 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between Frances H. Barton, plaintiff, and John S. Barbour, receiver of the Washington City, Virginia Midland and Great Southern Railroad Company, defendant (at law, No. 17278), a manifest error hath happened, to the great damage of the said plaintiff, as by her complaint appears, and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the United States, this 16th day of October, in the year of our Lord 1878, and of the Independence of the United States the 102d.

[SEAL.]

R. J. MEIGS,
Clerk of the Supreme Court of the District of Columbia.

DISTRICT OF COLUMBIA, *to wit:*

To John S. Barbour, receiver, &c.:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Frances H. Barton is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

D. K. CARTER,
Ch'f Just.

Service acknowledged.

M. S. COX,
Att'y for Def't.
LINDEN KENT,
Att'y for Def't.

Clerk's certificate.

CLERK'S OFFICE,
Supreme Court of the District of Columbia:

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 18th day of October, 1878.

R. J. MEIGS, *Clerk*,
By M. A CLANCY,
Assistant Clerk.

Justice's certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 18th day of Oct., 1878.

D. K. CARTTER, *Chief Justice.* [SEAL.]

Clerk's certificate to justice's official character.

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 18th day of October, 1878.

R. J. MEIGS, *Clerk*,
By M. A. CLANCY,
Assistant Clerk.

(Indorsement on cover:) No. 300. Frances H. Barton, plaintiff in error, vs. John S. Barbour, receiver of the Washington City, Virginia Midland and Great Southern Railroad Company. Dist. of Columbia sup. court. Filed 19th October, 1878.





SUPREME COURT
OF THE
UNITED STATES.

FRANCES H. BARTON, Pltf. in Error,

vs.

JOHN S. BARBOUR, Receiver. &c., Deft. in Error.

Error to the Supreme Court of the District of Columbia.

BRIEF OF S. S. HENKLE, COUNSEL FOR PLTF. IN ERROR.

In the Supreme Court of the United States.

October Term, 1881.

FRANCES H. BARTON
vs.
JOHN S. BARBOUR,
Receiver, &c.

On error to the Supreme Court of the District of Columbia.

Statement of the Case.

The defendant in error was Receiver of the Washington City, Virginia Midland and Great Southern R. R. Co., a Virginia corporation, owning, and before the appointment of the Receiver, operating a railroad in the State of Virginia. The trains ran into the City of Washton, and the company had an office and was doing business here. On the 13th of July, 1876, in a proceeding in equity then pending in the circuit court for the city of Alexandria, the defendant was appointed Receiver of said railroad, and was authorized to run and operate the same, and he was doing so on the 11th day of January, 1877, when the plaintiff, who was a passenger upon the road, was injured by an accident which she attributed to the negligence of the defendant or his agents. To recover damages for which, she brought this suit in the

Supreme Court of the District of Columbia. The defendant plead that he was Receiver, appointed as above stated, and that the plaintiff had not obtained the leave of the circuit court for the city of Alexandria to bring this suit. To this plea the plaintiff demurred. The court below, upon hearing, overruled the demurrer and rendered judgment against the plaintiff for costs of suit, to reverse which judgment the plaintiff prosecutes this writ of error.

ARGUMENT.

The sole question in the case is, whether without leave of the Court appointing him, first had, the defendant might be sued in this District for an injury to another occasioned by *his own* negligence while operating the road.

It is broadly laid down by High on Receivers, Sec. 254, that it is in all cases necessary that a person desiring to bring suit against a receiver should first obtain leave of the Court appointing him. And numerous authorities, English and American, are cited.

They are all cases in which either application for leave to sue is made, or applications for injunction to restrain such suits commenced without leave.

Sometimes the leave to sue has been granted, and sometimes withheld; and in most of the cases, where application was made to restrain suits commenced without leave, the injunction has been allowed. They are, I believe, all cases affecting the *property in the possession* of the Receiver.

As in Tink vs. Randle, 10 Beavans, 318;
In the matter of Presse *et al.*, 8 Irish Eq.;
Parr vs. Bell, 9 Irish Eq.

In the same section, 254, of High, it is said that when an action is instituted against a Receiver without leave, the plaintiff is in contempt, and will be punished.

The cases referred to by High are DeGroot vs. Jay, *et al* 30 Barb., 483, and the same case reported in 9 Ab. Pr., 364.

And the case of Taylor vs. Baldwin, 14 Ab. Pr., 166. Here the plaintiff applied to the Court for leave to bring suit against the Receiver to recover jewelry in his profession as Receiver, which was refused, and he brought the suit notwithstanding the refusal. He was fined for contempt and his action stayed. The proceedings were all in the same Court. To the cases cited by High I will add the case of Noe vs. Gibson, 7 Paige, 513. In this case a landlord and a bailiff levied a distress warrant for rent upon a vessel in the possession of a Receiver, and took it out of his possession.

It is not in either of these cases intimated that the want of leave goes to the jurisdiction of the Court in which the suit is brought.

The case of Angel vs. Smith, 9 Ves., 335, decided by Lord Eldon, is the English case most frequently cited.

"The cause coming on for further direction it appeared that an *ejectment had been brought about without leave of the Court, and had nearly proceeded to trial*, for lands in the possession of a Receiver under an appointment of the Court."

"The Lord Chancellor said the practice was when the Receiver was in possession, that an ejectment should not be brought without leave of the Court, and that in a

Supreme Court of the District of Columbia. The defendant plead that he was Receiver, appointed as above stated, and that the plaintiff had not obtained the leave of the circuit court for the city of Alexandria to bring this suit. To this plea the plaintiff demurred. The court below, upon hearing, overruled the demurrer and rendered judgment against the plaintiff for costs of suit, to reverse which judgment the plaintiff prosecutes this writ of error.

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"The Lord Chancellor said the practice was when the Receiver was in possession, that an ejectment should not be brought without leave of the Court, and that in a

former instance it was permitted to go on under the circumstance, having gone so far."

"His Lordship cautioned the solicitor that he would proceed at his peril."

"In consequence of this, a motion was made the next day for liberty to try the ejectment."

The Chancellor expresses strongly the view, that a suit ought not to be brought to to take the *possession* of property from a receiver or sequestrator without leave of the Court.

And the conclusion of the Report is so "The Lord Chancellor, after much discussion upon these points, permitted the ejectment to proceed."

It will be observed that the ejectment suit had progressed until it was *nearly ready for trial* before the fact was brought to the attention of the Chancellor. After scolding about it he permits the action to proceed.

The Chancellor does not intimate, nor had it occurred to the counsel for the Receiver, that the want of antecedent leave from the Chancellor might be plead to the jurisdiction of the law court.

And it was the direct object of this action to *dispossess* the Receivers.

The "anonymous" case in 6 Ves., 287, was a motion, that the Receiver should be at liberty to defend an ejectment, and to charge the expense in his accounts. The motion to defend was allowed; but the Chancellor said he "would reserve the consideration of the costs till after the trial; not approving a Receiver coming *just be-*

fore the trial, when it is impossible to have a reference to a master whether it is for the benefit of the parties that he should be at liberty to defend the ejectment."

In this case the motion was made just before the trial, and it is apparent that neither the Chancellor nor counsel understood that the leave of the Chancellor was a jurisdictional fact in the law court. And it would seem that the only question in the mind of the Chancellor was as to whether it was for the benefit of the parties interested in the Equity suit or not. I infer from the meager report that the Chancellor made no question, but that if the plaintiff in the ejectment established a a better title than that under which the Receiver held, that he had a right to take the possession from him.

The English cases all held that where the *possession* of the Receiver is sought to be disturbed, application ought to be made to the Chancellor for leave to bring the suit or make the levy, or distress, or to ask permission to come in and be examined *pro interesse suo;* and if such a suit be be brought or other attempts be made to interfere with the *possession* of the Receiver, the offending party may have his action or other proceeding restrained, and he is liable to be punished for contempt by the chancellor.

Bryan vs. Cornish, 1 Cox. Chy. 42.
Anon. 6 Ves. 287, Angel vs. Smith 9 Ves.
335, Brooks vs. Greatheart 1 Jac. and Walk. 176.
Aston vs. Heron 2 Myln. and K. 390.

In all the English cases in which it was necessary to obtain the leave of the chancellor, the direct object of the action in other proceeding was to divest the Receiver of his possession of the property, and I think I

may safely say that no English case can be found, where it was held that the failure to obtain leave of the chancellor to bring a suit in a law court against a receiver, might be plead to the jurisdiction of the latter court.

Independently of the fact that no English case can be found in which such a plea was interposed in a law court, the equity cases all show that no chancellor ever entertained such an idea.

In some of the cases the language used by the chancellor is that an action to disturb the possession of a Receiver should not, or ought not, and possibly in one or two cases, *could* not be brought without leave and, &c. But it is perfectly apparent that all that is meant, whatever the form of expression, is, that the Chancellor if application be made to him by the receiver, would restrain the party from prosecuting it, if in his judgment it ought not to proceed, and if a wanton interference with the custody of the receiver was shown, the offender would be punished for contempt.

Take the leading case of Angel vs. Smith *supra*. The report say: "*An ejectment had been brought without leave of the court, and had nearly proceeded to trial for lands in the possession of the receiver.*" As we have seen, the Lord Chancellor, after much discussion, permitted the ejectment to proceed.

So in the anonymous case in 6 Ves. *Supra* the chancellor gave the receiver leave to defend an ejectment, *just before the trial.* Supposed he had refused his permission to the receiver to defend, as he seemed to have been half inclined to do, would that have taken away the *jurisdiction* of the law court to try the case?

Or in the case of Angel and Smith, if the chancellor had withheld his permission, but had not enjoined the plaintiff from proceeding in his action, would the want of affirmative leave, have ousted the jurisdiction of the law court?

It seems to me quite apparent that the granting or withholding of permission by the chancellor, could in no wise affect the *jurisdiction* of the law court.

The chancellor might, it is true, lay his hand upon a party who was using the machinery of another court to take property out of his possession, and stop him by injunction and punish him for the contempt, and thus arrest the case in the law court, but in no other way or sense could the jurisdiction of the latter court be affected by the granting or withholding of leave by the chancellor.

Whether this be the logic of the English cases or not, it is certain that no such plea as this, is to be found in the English reports, and it is more than probable if it had been the law, some English lawyer would have discovered it.

Noe vs. Gilson 7 Paige 513, is a leading American case

Where a landlord and a bailiff took the property, a vessel, out of the hands of a receiver, on a distress warrant, for rent.

Says the court, "It is well settled that after a receiver had been appointed and has taken the rightful possession of property, it is a contempt of court for a third person to deprive him of the possession by force, or even by a suit or other proceedings against him, without the per-

mission of the court by whom the receiver was appointed." The same principles are applicable to every other interference with the possession of a receiver, sequestrator, committee or custodee, who holds the property as the officer of the court, as his possession is in all, the possession of the court." An attachment was directed to issue against the respondents in which they were holden to bail in the sum of $250 each, unless they within 20 days restore the vessel.

And to the same effect are, indeed all the cases in the State courts, with two exceptions which I shall presently refer to, and in no one of them that I have been able to find has it been held that want of leave was a good plea to the jurisdiction of the law court.

In the cases of Hubbell vs. Dana 9 How. Pr. 424 and Jays case 9 Ab. Pr. 293.

Motion was made to dismiss because leave had not been granted to bring the suits, but this was in the same courts which appointed the receiver, and in each case the motion was denied. But it seems to be assumed that if the right to make it was not waived, the motion might be made. But a different view was held in Chautauqua County Bank vs. Risley, 19 New York 369.

This was an ejectment by a purchase at a sheriff's sale against a purchaser from a receiver, who was in possession under deed from the receiver, dated May 7, 1840, and the sheriff's deed May 30, 1840.

The court say, "We have been referred to cases showing that any attempt by a person having an outstanding right or title, to disturb the possession of a receiver, is a contempt of the court of chancery—all the doctrine

on this subject which is pertinent to the present ques-question may be seen by referring to the case of Angell vs. Smith, 9 Ves. 335." The court then goes into an analysis of that case and says, "In all the discussion no doubt was suggested that a prior legal title would prevail against a receiver's possession. The questions considered were, whether leave must be asked and whether in that particular case, it should be granted "Now in this practice of the court of chancery, I see nothing even to suggest a doubt of the validity of a title acquired by a sale under a judgment which is a legal lien upon upon the land sold prior and paramount to the title or possession of a receiver."

"It may be the creditor should ask leave of the court of chancery before he proceeds to sell, or that the purchaser acquiring the title should make a like application before he bring his ejectment. If, however, he fails to do so, the question is merely whether the court will consider him in contempt and punish him accordingly. The sale itself is but the assertion of a legal right, and it cannot be illegal and void on the ground that the leave of an equitable tribunal is not first asked and obtained."

Receivers are under the protection of the court appointing them; but this protection is only granted or refused on their own application by the court appointing them, in its discretion, depending upon the circumstances of each case.

Camp vs. Barney, 11 N. Y. Sup. Ct., 373;
Blumenthal vs. Breinkerd et al., 38 Vt., 402;
Paige vs. Smith, 99 Mass., 395;
Allen vs. The Central R .R. of Iowa, 42 Iowa., 683.

It can not be possible that the jurisdiction of one court depends upon the exercise of the discretion of another distinct and independent court in granting or withholding leave to the plaintiff to bring the suit, or where he has brought it without leave, in granting or withholding leave to prosecute it to judgment.

As we have seen, the leave may be granted at *any time before the trial* in the law court, and then the casy may progress to judgment.

But objection to jurisdiction where it is founded on privilege, must be taken in *limine*, otherwise it is waived.

Hubbell vs. Dana, 9 How. P., 424.

"An action against a receiver in his official capacite concerning matters pertaining to his receivership, will not be enjoined upon the ground that the matter has been passed upon in other proceedings, since if this is so, it furnishes a complete defence to the action sought to be enjoined, and the receiver should avail himself of it in that action."

High on Receivers, sec. 257;
Jay's case, 9 Ab. P., 293.

The case of Hill vs. Parker, 111 Mass., 508, was replevin of a locomotive engine from the receiver of the Boston & Albany R. R. The suit was admitted to have been brought without leave, and the defendant asked the court to charge the jury that if they found the suit was brought without leave, the plaintiff could not recover. The Court Justice Gray, after stating that the bringing of a suit without leave may be treated as a contempt, &c., says: "and when the action is brought with-

out applying for such leave, the possession of the receiver *is not necessarily a valid defence at law*, and the court of chancery, if applied to for an injunction, may, in its discretion, allow the action to proceed to judgment and to be defendant by the receiver."

In this case the property was taken out of the hands of the receiver, and yet the Supeme Court of Massachusetts held that the want of leave was not a defence in the law court.

Hitherto I have been dealing wieh suits which had for their object the invasion of the possession of the receiver, and the deduction from the English and American cases is, that the Receiver is under the protection of the court appointing him, and when a suit at law is brought against him in another court without leave, that may endanger his possession of the property held under his receivership, he may apply to the court to protect him from such suit; and if the court is of opinion that the suit ought not to be prosecuted, it may stay it by enjoining the plaintiff from proceeding further with it' or it may punish him for contempt in interfering with its possession of property without leave, or it may allow the action to proceed. But that it is a question solely addressed to the chancellor and cannot be set up as a defence to the action at law.

Here the Receiver was running a railroad, and by his negligence a passengor was injured and she sues to obtain a liquidation of her damages, she does not seek to take possession of the road or any of its properties.

Upon principle, what objection can there be to it?

The defendant was holding himself out to the world as a common carrier. The railroad company was in abeyance. He contracts with hundreds, if not thousands, of people daily to carry them over his road. He receives their money, why should he not be held to the usual responsibilities of the character that he assumes?

Although appointed by a State court in Virginia his line of road stretches through the State and his trains ran into the city of Washington, where he has an office and makes hundreds of contracts for carrying passengers, daily.

Is it not a little absurd to require a poor man whose cow is run over in this District, to go to Alexandria and ask leave of the courts there to sue the Receiver?

In Cowdrey et al vs. Galveston, etc., R. R. Co., 3 Otto, 352, this court decided that the earnings of a railroad are chargeable with goods lost in transportation and with damages done to property whilst the road was in the hands of a receiver.

Why may he not be sued for his own delinquencies just as any other person natural or artificial who is doing business as a common carrier?

Who is the public to look to but the party who is ostensibly running the road?

Not one passenger in a thousand would know that he was dealing with the circuit court of Alexandria when he was buying a ticket to travel on this road.

By putting him in the position and giving him authority to operate the road, the court vouches for his prudence and qualifications, and invites the public to deal with

him. And it would be unreasonable and unjust that persons who deal with him or who are injured by him, should be hampered by restrictions or requirements in the pursuit of their remedies against him, that are not applicable to other common carriers.

I now invite the attention of the court to the late decisions in the State courts, touching the question of jurisdiction.

Camp vs. Barney, 11 Supreme Court N. Y., 4 Hun., 373, was an action at law against the receiver of the Buffalo, Corng. & Pittsburgh R. R. Co. appointed by the United States District Court in a proceeding in bankruptcy. The action was to recover damages for a personal injury to a passenger upon said road while it was being operated by the defendant. The reasoning of the court is that a receiver may ayply to the court which appointed him for protection against the action, but if he does not, he will be presumed to have waived it, and the action may proceed against him at law.

Sprague vs. Smith, 29 Vt., 421, was a case where the trustees in a railroad mortgage were running the road having possession of it for that purpose. A freighter who was traveling in the saloon car accompanying his freight was injured by a collision.

The defendants claimed that they were mere agents, and not liable. The Court held that they were liable, and to the same extent precisely that the company would have been while continuing the same business.

Blumenthal vs. Brainard *et al.*, 38 Vt. 402.

The defendants were running a railroad as Receivers when the liability arose.

The Court say: "A Court of Chancery will protect a person acting under its process or authority in the execution of a decree or decretal order, against suits at law, and will compel parties to apply to the Court for relief. This protection is accorded to its officers only on their own application, and is granted by the chancellor in the exercise of his discretion, and it is presumed that it would be granted in any necessary or proper case for relief." And the Court hold that as they were managing and controlling a line of road, it is no defence to an action at law; "that they were running and managing the line of railroad as Receivers under an appointment of a Court of Chancery."

Paige vs. Smith, 99 Mass., 395.

The defendants were Receivers, operating the Vermont & Canada, & Vermont Central R. R. They contracted to transport 55 bales of hay, which was burned while in their possession.

They defended, that they were Receivers, and not liable to be sued; and so the Court below held. But the Supreme Court held that they were not exempt from the ordinary common law liabilities of common carriers, and that the rule that receivers were only answerable to the court by which they were appointed, is inapplicable.

Kinney vs. Crocker, 18 Wis. 80.

This suit was brought to recover for injuries occasioned to the plaintiff for the negligence of the agents of the defendants in running a train of cars across a street in the city of Milwaukee without warning. The defendant was at the time in the possession of and operating the railroad as receiver under the order of the U. S. District Court.

The court below was asked to instruct the jury that unless they should find that the plaintiff had leave from District Court to bring this suit, he could not recover; which was refused, and an exception taken. Says the Court: The refusal was proper.

"The authorities relied upon only show that a Court of Equity will, on the proper application, protect its own receiver where the possession which he holds under the authority of the Court is sought to be disturbed, or where he is sued for any act done by order or direction of the Court. In such cases it will sometimes punish, as for a contempt, any attempt to disturb the possession of its officer; it will sometimes restrain suits at law and draw to itself all disputed claims in respect to the subject-matter; and sometimes it will allow the suits at law to proceed. But in all these cases, *it is not a question* of jurisdiction in the courts of law, but only a question whether equity will exercise its own acknowledged jurisdiction of restraining suits at law under such circumstances and itself dispose of the matter involved." "It follows that although a plaintiff in such case, desiring to prosecute a legal claim for damages against a receiver, might, in order to relieve himself from the liability to have his proceeding arrested by an exercise of its equitable jurisdiction, very properly obtain leave to prosecute; yet his failure to do so is no bar to the jurisdiction of the court of law and no defence to an otherwise legal action in the trial. There can be no room to question this conclusion in all cases where there is no attempt to interfere with the actual possession of property which the receiver holds under the order of the Court of Chancery, but only an attempt to obtain a judgment at law in a claim for damages."

Allen vs. The Cent. R. R., of Iowa, 42 Iowa, 683.

Was an action against the R. R. Co. by a passenger to recover damages for his wrongful ejection from a car after having paid his fare?

The company set up, among other defences, that the road was in the hands of a receiver at the time of the occurrence, and that he was liable.

The Court in discussing the question refers to the case of Kinney and Crocker, and adopts fully the reasoning and doctrine of that case.

After much research, I think I can safely say, of the American cases in the State courts, that no case can be found in which a plea to the jurisdiction of a law court in an action like this has ever been sustained. The only cases approximating it that I have been able to find in the State courts are those already referred to in the inferior courts of New York upon motions to dismiss actions against receivers, brought without leave, in the same courts that appointed them.

The learned counsel for the defence, in the argument in the court below, cited no case from any State court which sustains his plea.

A case much relied upon was Meara's, Adm'r, vs. Holbrook et al., 20 O. S., 137.

The action was a joint one against the receivers of a railroad and the company, for a personal injury to the plaintiff while the road was being run by the receivers. Leave had been granted to the plaintiff to bring the suit, so that our question was not directly before the

Court. But they say: "It is claimed that notwithstanding the Court granted leave to bring the action against the receivers, they are not thereby debarred from insisting upon any defence that would otherwise be available to them. It is, therefore, claimed that the action cannot be maintained, because the receivers are public officers and are not answerable in their official capacity either for their own negligence or that of their employees." "A receiver, it is true, is an officer of the court appointing him, but it does not follow that he is a public officer, exempt as such from liabilities for injuries sustained by the negligent discharge of the duties imposed upon him."

Another cited was Potter, Receiver, vs. Bunnell, 20 O. S.

This was an action against a receiver of a R. R. for damages caused by the negligence of the receiver. Leave was granted to bring the suit without notice to the receiver. He claimed that he was entitled to notice of the application. The Court decided that he was not. It is not even hinted that the action could not be brought without leave.

The case of the Louisville, New Albany, & Chicago R. R. vs. Cauble, 46 Ind., 277, was cited in support of the plea; but it does not so much as touch the question in this case. It turned solely upon the constitutionality of a statute of Indiana.

The case of Thompson vs. Scott, 4 Dill., 508, was cited below.

This was a motion by the receiver of a R. R. to punish the defendant for contempt in bringing a suit in the

State court against him without leave.

It was decided by U. S. District Judge Love.

The Judge argues that it is the duty of the U. S. Courts to protect its receivers from such suits, and insists that such suits ought not to be brought without leave.

The decision was that "unless the respondent shall stipulate to dismiss the suit in the State Court, an attachment against him will issue."

It is not intimated that the want of leave might be plead to the jurisdiction of the State court.

While I found no such plea as this in any State court, I have found one in the U. S. Circuit Court of Miss. decided by District Judge Hill, in 1877, and found in the 7th Central Law Journal, 146.

It was a suit for a personal injury brought against the Receiver of a railroad appointed by the U. S. Circuit Court. Under the act of Congress it was removed, on motion of the defendant, to the circuit court. In that court the receiver filed a demurrer upon the ground that the suit had been brought without leave. The demurrer was sustained. It will be observed that the demurrer was in the same court with the Receiver's suit, and was practically the equivalent of an injunction against the prosecution of the case—an order which the Judge had undoubted power to make. But the demurrer was unique, and never before known in practice.

I think I have conclusively shown from the authorities that the bringing of an action at law against a receiver without the leave of the court appointing him

in another and independent court, has never, either in the English or American State courts, been held to be pleadable to the jurisdiction of the law court. But by the uniform usage and practice of those conrts the receiver has been under the protection of the court whose officer he is, to be invoked only on his own application. That in England no receiver ever set up such a defence in a law court; and never in an American State court has such a defence been sustained; and in most of the cases the direct object of the action was to disposses the the receiver.

Against all this weight of authority it is supposed that two decisions of this court are opposed, and this supposition controlled the judgment of the court below in this case.

The first case is Wiswell vs. Sampson, 14 How., 61.

This was an action of ejectment to recover a lot of land in the city of Mobile, brought in the United States Circuit Court.

The plaintiff derived his title from the purchaser at an execution sale upon two judgments at law, rendered in the United States Circuit Court.

The defendant was in possession under a purchase from a master in chancery in a proceeding in equity in the State court, instituted by him (being a junior judgment creditor) to set aside a fraudulent sale of the lot made by Ticknor, the judgment debtor, antecedent to either of the judgments. The sale by the marshall under which the the plaintiff claimed, was made July 7, 1845, and the sale by the master under which defendant claimed was March 1st, 1847.

But at the time of the sale by the marshall the lot was in possession of a receiver appointed by the State court in the equity case, and at the sale the marshall made this announcement. It further appeared that the property was bid off by Dargan, the attorney for one of judgment creditors, upon an agreement with the other judgment creditor that no money was to be paid unless his title should be maintained.

Mr. Justice Nelson, in delivering the opinion of this court, after reviewing the English and American cases, says: "A party, therefore, holding a judgment which is a prior lien upon the property, the same as a mortgagee, if desirous of enforcing it against the estate after it has been taken into the care and custody of the court, to abide the final determination of the litigation and pending that litigation, must first obtain leave of the court for this purpose. The court will direct a master to inquire into the circumstances, whether it is an existing unsatisfied demand or as to the priority of the lien, &c., and take care that the fund be applied accordingly."

"The settled rule also appears to be, that where the subject-matter of the suit in equity is real estate, and which is taken into the possession of the court pending the litigation, by the appointment of a receiver, or by sequestration, the title is bound from the filing of the bill; and any purchaser *pendente lite*, even if for a valuable consideration, comes in at his peril."

In reply to the argument of counsel, that a sale upon execution might occasion no disturbance of the possession of the receiver, "and hence no contempt of the authority of the court, and that the the sale therefore, in such a case, should be upheld," the court says, "But con-

ceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. The property is a fund in court to abide the event of the litigation, and to be applied to the payment of the judgment creditor, who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made. And in order to effect this, the court must administer it independently ot any rights acquired by third persons, pending the litigation, otherwise the whole fund may have passed out of his hands before the final decree, and the litigation becomes fruitless."

"It is true, in administering the fund the court will take care that the rights of prior liens or encumbrances shall not be destroyed; and will adopt the proper measures by reference to the master or otherwise, to ascertain them and bring them before it. Unless the court be permitted to retain the possession of the fund thus to administer it, how can it ascertain the interest in the same, to which the prosecuting judgment creditor is entitled, and apply it upon his demand?"

And again: "But it is not necessary to go this length in the case before us, as it is sufficient to say, that the sale under the judgment, pending the equity suit, and while the court was in possession of the estate without the leave of the court, was illegal and void.

The court further says, that in case the judgment creditor, had come in and claimed his lien, it would have been competent to have decreed a sale subject to his judgment. The purchaser would then have had to

pay it off, and the rights of the several claimants to the fund would have been settled.

And again: "It is sufficient for the disposition of this case, that while the estate is in the custody of the court, as a fund to abide the result of a suit pending, no sale of the property can take place either on execution or otherwise, without the leave of the court, for that purpose. And upon this ground we hold that the sale by the marshall on the two judgments was illegal and void, and passed no title to the purchase."

The gist of the case as I understand it, is, that while a court of equity, is in possession of property, as a fund to be administered by it, it will not permit the property to be sold on execution or otherwise without leave, and if it is, it will treat the sale as void.

The whole opinion proceeds upon the theory that a sale upon execution will interfere with the administration of the fund by the equity court. There is no objection to a money judgment, for the court says the judgment creditor should come in, and his rights would be protected, and if he was entitled to priority that would be accorded to him; and if there is no objection to an existing judgment creditor coming in, can there be any objection to a judgment being rendered against the debtor while his property is in the hands of a receiver? So soon as he has obtained judgment he might come into the equity court and assert his right against the fund, and if the court found him entitled to priority it would accord it to him; but it would not permit him to levy on and sell the property while in the possession of the court.

Here was no suit against the receiver, but a proceeding affecting the *rem* in the custody of the court.

The other case is Peale vs. Phipps, decided at the same term with Wiswell vs. Sampson, 14 How. 228.

The defendants in error filed a petition in the U. S. Circuit Court in Louisiana against the plaintiff in error, who was the trustee and assignee of the Agricultural Bank of Mississippi, appointed by a decree of a State court of competent jurisdiction. The petition avers that the bank was indebted to the plaintiff $34,000, that by the dercee of the circuit court of Adams county, the charter of the Agricultural Bank was declared forfeited and the corporation dissolved, and that Peale was appointed trustee and assignee of the Bank, and is the sole legal representative of the corporation; and they aver that by operation of law, all the assets of the corporation are vested in him as assignee, and that he became legally liable to the creditors to the extent of the assets which may come into his hands; and that he has assets in his possession, sufficient to pay all the debts of the corporation.

Peale, the assignee, filed sundry exceptions, the second exception denying the jurisdiction of the court, upon the ground that as trustee for the bank he is not amenable to any other court than the one that appointed him.

"At the hearing of the exceptions, they were all overruled, and a decree was finally passed against Peale, as trustree and representative of the Agricultural Bank, directing him to pay to the petitioners the sum of $20,058, with interest thereon at 5 per cent. until paid; *and that the petitioners have execution therefor upon the prop-*

erty, assets, goods and chattles, rights and credits of the said president, directors, and company of the Agricultural Bank of Mississippi, then in the hands of said Peale, as trustee, or which might thereafter come to his hands."

Says Taney, C. J., in delivering the opinion of this court: "The powers, duties, and responsipilities of plaintiff in error, as trustee, are regulated by the laws of Mississippi."

The opinion then refers to the provisions of various acts of the Legislature of Mississippi, relating to the forfeiture of the charters of banks, the appointment of trustees to take charge of books and assets, "and to collect the debts and sell the property of the Bank and apply the proceeds in the manner which may be directed by law, to the payment of debts due from the corporation. The trustee is required to give bond for the faithful discharge of his duties. He is required on oath to return an inventory of all the property and evidences of debt which shall have come into his possession; and under the direction of the court to sell the same at public auction, and render an account of the sales so made to the court. At the time at which the judgment of forfeiture is rendered, the court is required to appoint three commissioners to audit claims against the corporation; and it is made their duty to report their proceedings to the court at the first term after the expiration of twelve months, allowed for the presentation of claims, at which time all the exceptions to the report are to be heard and determined, and the court thereupon required to direct the distribution of the money in the hands of the trustee, to be made in the order prescribed by law."

The court says it was under these acts of the Legislature that the charter of the Bank was declared forfeited, and the plaintiff in error appointed trustee. Commissioners were also at the same time appointed to audit the accounts, who rejected the claim. Upon this refusal to allow it, this suit was instituted in the U. S. Circuit Court.

Says this court: "We see no grounds upon which the jurisdiction of the court can be sustained. The plaintiff in error held the assets of the Bank as agent and receiver of the court of Adams county, and subject to its order, and was not authorized to dispose of the assets or to pay any debts due from the Bank, except by order of the court. He had given a bond for the performance of this duty, and would be liable to an action if he paid any claim without the authority of the court from which he received his appointment and to which he was accountable. The property in legal contemplation was in the custody of the court of which he was an officer, and had been placed there by the laws of Mississippi. And while it was thus retained in the custody and possession of that court, awaiting its order and decision, no other court had a right to interfere with it or to wrest it from the hands of its agent and thereby put it out of his power to perform his duty."

This was, in fact, a proceeding *in rem*, although in the form of a suit against the assignee.

The pretended claim of the plaintiff below was against the Bank. There was no privity of contract between Peale and the Petitioners, and of course no pretense of a right of action against him except on account of his holding the property of the Bank as assignee for the benefit of its creditors, so that it was a proceeding in the

U. S. Circuit Court to take the assets of the in insolvent Bank from the State Court where they were being administered, for the benefit of the creditors of the Bank, which of course could not be done. The only judgment that could have been rendered in favor of the petitioners, was that the defendant should pay out of the assets of the Bank in his hands, which he had no right nor power to do, and hence the exception which was in the nature of a demurrer, was properly sustained. The whole proceeding was statuory. The statute required claims against the defunct bank in process of administration to be presented for allowance to the commissioners appointed by the Court to audit them. Upon its rejection the claimants if dissatisfied should have excepted to the disallowance and let the Court pass upon it. This was the statutory mode, and it made no provision for any other. *Expresio unius, exclusio alterius.*

There can be no doubt that the Circuit Court had no jurisdiction to entertain such a suit. But I am totally unable to perceive that the principle decided in Peale and Phipps, has the remotest application to the case at bar.

The *habitat* of the Washington City, Virginia Midland, and Great Southern R. R. Co., is in Virginia, but the declaration avers that they were doing business and had an office in this District, and the Receiver for the time being, taking the place of the company, may be sued wherever the company might.

Meara's Admr. vs. Rosevelt et al, 20, O. S., 137.

Under the law of this District a foreign corporation having an office and doing business in the District is liable to suit here.

Revised Stats. Dist. of Columbia, p. 94, sec. 740;

The trains run by the defendant arrived in and departed from this city. He lived here and had an office here, at which a large part of the business of the Road was transacted.

But independently of the Statute, a receiver operating a railroad, is a common carrier, and liable to suit for his own acts and those of his employe's, assuch, and the right of action is transitory.

Paige vs. Smith, 99 Mass., 395;
Sprague vs. Smith, 29 Vt., 421;
Blumenthal vs. Brainhard, et al, 38 Vt., 402.

There are several similar cases pending in the Court below awaiting the decision of this case. But the question involved, as a question of practice has an importance far beyond the pending cases. The country is covered with a net work of railroads, and their trains and business utterly disregard State lines. Many of these roads are operated by receivers and many more probably will be, and it seems to me of the highest importance that this Court shall authoritatively establish the doctrine that a receiver operating a railroad is a common carrier, and held to the usual responsibilities of such carriers.

S. S. HENKLE,
Counsel for Pl'tff in Error.

OFFICE SUPREME COURT U. S.
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OCT 20 1881
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IN THE

Supreme Court of the United States.

No. 56.—October Term, 1881.

FRANCES H. BARTON, Plaintiff in Error,

vs.

JOHN S. BARBOUR, Receiver, &c.

Brief of LINDEN KENT,

Counsel for Appellee.

J. L. Pearson, Printer, 9th and D sts., Washington.

IN THE

Supreme Court of the United States.

No. 56.—October Term, 1881.

Frances H. Barton, Plaintiff in Error, *vs.* Jno. S. Barbour, Receiver, &c.	On error to the Supreme Court of the District of Columbia.

Brief of LINDEN KENT, Counsel for Appellee.

Statement.

The plaintiff in error brought suit in the Supreme Court of the District of Columbia, against the defendant, John S. Barbour, as Receiver of the Washington City, Virginia Midland and Great Southern Railroad Company, a corporation chartered and organized under the laws of the State of Virginia, for damages sustained by the plaintiff in an accident on said road on the 11th day of January, 1877. A plea to the jurisdiction of the court was filed by the defendant, in the following words:

"And now comes the defendant in his own proper person and says, that the court ought not to take further cognizance of said action; because, he says, at the time of suing out and service on him of the said writ he was the receiver of all the real and personal property, rights, privileges, and franchises of the said Washington City, Virginia Midland and Great Southern R. R. Co., under an order

issued by the Circuit Court for the City of Alexandria, in the State of Virginia, in vacation, on the 13th day of July, 1876, in a cause therein depending on the equity side of said court, of the style of John C. Graham, who sues for himself and others, vs. The Washington City, Virginia Midland and Great Southern R. R. Co., et al. That by said order or decree he was authorized to defend all actions that might be brought against him as such receiver by permission of the said court. And that he should not in any case incur any personal and individual liability in the operation of said line of railroad or otherwise in the premises, by reason of any act or thing done by him, or his servants, agents, or attorneys, the said receiver acting in good faith and in the exercise of his best discretion; but the property in his hands as such receiver should nevertheless be chargeable with any claim that may be established against such receiver in any action brought against him by any person under leave of the court first had and obtained.

"That the plaintiff hath not had and obtained leave of the said Circuit Court for the City of Alexandria, to bring and maintain this action aforesaid. And this the defendant is ready to verify. Wherefore he prays judgment whether this court can or will take further cognizance of the action aforesaid.

"JOHN S. BARBOUR,
"*Receiver of the Washington City, Virginia Midland and Great Southern R. R. Co.*"

To this plea the plaintiff filed a demurrer, which upon hearing was overruled by the court below, and judgment was rendered against the plaintiff.

Argument.

The sole question, as correctly stated by the counsel for the plaintiff in error, is, whether without leave of the Circuit Court of Alexandria City, Va., first had and obtained, the defendant, as receiver of the Washington City, Virginia Midland and Great Southern Railroad Company, might be sued in the Supreme Court of the District of Columbia, for an injury to the plaintiff occasioned by the

negligence of the defendant while operating the said road in the State of Virginia.

It is conceded as a general principle, that an action to disturb the possession of a receiver cannot be brought without leave of the court appointing him. That the possession of the receiver is the possession of the court.

Further, the remedy to a party having a demand against a receiver, is by petition to the court of equity to be permitted to bring an action against the receiver or to be examined before the master *pro interesse suo.*

3 Dan. Chy P., 1,784.

Wiswall vs. Sampson, 14 How., 65.

These well-defined doctrines would seem to be sufficient to dispose of the case; but on the other hand it is contended—

1. That there is here no attempt to interfere with the actual possession of the property which the receiver holds under the order of the court of chancery, but only an attempt to obtain a judgment at law in a claim for damages.

2. That a receiver in the possession of and operating a railroad is not exempt from the ordinary common-law liabilities of common carriers, and that the rule that he is only answerable to the court by which he is appointed is inapplicable.

3. *That it is not a question of jurisdiction* in the courts of law, but only a question whether equity will exercise its own acknowledged jurisdiction of restraining suits at law under such circumstances, and itself dispose of the matter involved.

I think I have fully and accurately set forth the grounds upon which the plaintiff seeks to maintain her position, and will now consider them in order.

1. Every suit against a receiver, as such, is a proceeding set on foot to reach the assets or properties in his hands, and hence in the hands or possession of the court—for the

judgment will be entered against him, payable out of the corporate funds in his hands.

Commonwealth vs. Runk, 26 Penn., 235.
Thompson, Rec'r, vs. Scott, 4 Dillon, 508.

2 Woods, 520

A judgment against a receiver, as such, must be satisfied out of the property of the company in his hands as such.

Camp vs. Barney, 11 N. Y., 373.

This identical question is decided by this court in the case of *Peale vs. Phipps*, 14 *How.*, 268, reasserting the doctrine laid down in *Wiswall vs. Sampson, supra*, that the possession of the receiver shall not be disturbed without the leave of the court, &c. It goes further and says, that the receiver is not *amenable to suit, and shall not be required to pay* any debt due from the corporation without the leave and order of the court appointing him.

The only case cited on the other side directly in point is Kinney vs. Crocker, 18 Wisconsin, 80, which, in terms, overrules both Wiswall vs. Sampson and Freman vs. Howe.

24 How., 450.

2. The first branch of the second proposition, namely, that a receiver in the possession of and operating a railroad is not exempt from the ordinary common-law liabilities of common carriers, is true. The question at issue is as to the forum in which he is amenable, and grows out of the second branch of the proposition. It is argued that because he is a common carrier, not only is the manner in which his liabilities are to be determined involved, but, unlike all other receivers, in his case the doctrine that they are amenable only to the court by which they are appointed is inapplicable; and this doctrine is evolved out of some supposed demand or necessity of public policy. Before the appointment of the receiver of this railroad it was contended that under the statute law of Virginia the corporation could only be sued at the locus of its chief office in Alexandria; and if such was the case, the jurisdiction within which the corporation could have been sued

was not more extended than that with respect of the receiver. The public have all of its rights in dealing with the receiver; he is held to the usual responsibility of the character he assumes. On the other hand, however, it would seem that, of all receivers, a receiver operating a railroad should be held most strictly answerable to the court appointing him. If, as is said in the brief of plaintiff's counsel, "he contracts with hundreds, if not thousands, of people daily," and is answerable to other courts in actions upon these contracts, which are without limit, how is it possible that the receiver or the property of the corporation can be protected and preserved by the equity court appointing the receiver?

The cases cited by the plaintiff's counsel in support of his theory can be distinguished and reconciled in this view: In these cases it was not a question of forum; it was a question involving the liabilities of receivers. The first case is Sprague vs. Smith, 29 Vermont, 421. Here the trustees under a mortgage had taken possession of the railroad, and, being in possession, were running it. They were not answerable to any court. They claimed that they were mere agents and not liable. The court held that they were liable, and to the same extent precisely that the company would have been while continuing the same business. Paige vs. Smith, 99 Mass., 396, is no authority in itself; it merely accepts the law of the State of Vermont on the question in that state, as laid down by the Supreme Court in the case of Blumenthal vs. Brainard and others, 38 Vermont, 402. In this case it does not appear what were the provisions of the decree appointing the receiver, with respect of the right to sue him without leave.

In the two cases above, as in Meara's Adm'r vs. Holbrook, 20 Ohio St., 137, the question of jurisdiction was not raised—the forum was not objected to,—but the question was on the merits: whether or not the official character of the receiver, when sued by leave of the court,

would not protect him from liabilities for injuries arising out of the prosecution of his business. It was contended that the receivers were public officers, and as such not answerable in their official characters, either for their own negligence or that of their employees. Those cases decided that they were not exempt, and hence were only authority on the question of liability, and are not authority on the point upon which they are cited. In the other case cited—of Allen vs. Central Railroad Co., 42 Iowa, 683—the suit was not brought against the receiver, but against the defendant corporation in the hands of a receiver, and the court held that suit could be prosecuted against the corporation as such, without obtaining leave of the court appointing the receiver, referring to Ohio & Miss. R. Co. vs. Fitch, 20 Ind., 504; that a suit could be prosecuted against the corporation while it was in the possession of the receiver; and if these cases correctly state the law, then the plaintiff in this case could have brought suit against the Virginia Midland Railroad Co., without obtaining leave of the Circuit Court of Alexandria City; but if the plaintiff elects to sue the receiver as such, and the Supreme Court of the District of Columbia entertains such suit, it is a recognition of the official character of the defendant, and the court will take notice of the terms of the decree appointing him, when brought to its attention. He derives his official character from the decree appointing him, and if the Supreme Court of the District of Columbia has any jurisdiction over him for the purposes of suit, it comes through this decree; but the decree in terms says that its receiver shall not be chargeable as such in any suit against him, except with the leave of the court first had and obtained.

3. Can the question be considered as one of jurisdiction in the Supreme Court of the District of Columbia.

The number of cases cited on the brief of the counsel for plaintiff, in support of the doctrine maintained by him,

that the question cannot be considered as one of jurisdiction, are none of them cases deciding that it is not, but they are all of them cases in which the circumstances prohibit the point being raised as such.

In certain of the cases cited, as in Taylor vs. Baldwin, 14 Ab. Pr., 166, all of the proceedings were in the same court, and the action was stayed or dismissed, and the party fined for a contempt.

In the other cases, as in Noe vs. Gibson, 7 Paige, 503, the equity court had jurisdiction of the parties, and there was no proceeding in any other court in which the question of jurisdiction could be raised. The case of Noe vs. Gibson was where a landlord and a bailiff levied a distress warrant for rent upon a vessel in the possession of a receiver and took it out of his possession. There were no proceedings in any other court in which the question of jurisdiction could be considered, the parties were proceeding to execute the distress warrant, and the only remedy was by an injunction to restrain them, and punish for contempt.—(Robinson vs. Atlantic & Grt. West. R., 66 Penn. St., 160.) In other cases the jurisdiction was conceded in the first instance, and the cases went to trial on the merits.

If the law court has any jurisdiction in a case of this kind, it is a jurisdiction founded on privilege, and the objection must be taken *in limine*, otherwise it is waived.

Hubbell vs. Dana, 9 How. Pr., 424.

In the case of *Potter, Rec'r, vs. Bunnell*, 20 *Ohio St.*, 158, suit was brought against the receiver, leave of the equity court having been first had and obtained. It was in this case contended that the court did not have *jurisdiction*, because proper notice had not been given to the parties in the case, of the application for the order granting leave. The court say that proper notice had been given of the application. "The court granted leave to bring the action 'against him as receiver, and ordered him to answer 'thereto. His official protection from suit, whatever it 'may have been, was thus removed. After the receiver

'complied with the order of the court by answering to the 'action, there was surely no want of jurisdiction." It is submitted that this case lays down the doctrine correctly, and draws the distinction between the jurisdiction absolute, which can be neither given nor taken away, and the jurisdiction founded on privilege, which depends upon the court appointing the receiver.

On the other hand, it is contended that the jurisdiction of the law court, in which suit is brought against the receiver, is absolute; that it is independent of the court appointing the receiver; that it is immaterial to the jurisdiction of the law court whether leave to sue be refused or granted.

In order that the contention of the plaintiff shall be sustained, this doctrine must be made out; and in support of it no authority can be found, save, perhaps, the case of *Kinney vs. Crocker, supra.*

In this case leave has not been asked of the Circuit Court of Alexandria City to sue this receiver; whether it would have been granted or not is not known, but that the plaintiff, proceeding without the leave of that court, is in open contempt is conceded; yet it is said that this is something that the law court has nothing to do with, that they will hold the jurisdiction notwithstanding it is in contempt of the state court. Says the plaintiff, you must go to the state court appointing the receiver to enjoin me or punish me for contempt. The state court has no jurisdiction over the plaintiff, its process cannot reach her. If the state court should direct the writ to issue enjoining the plaintiff from further proceeding, it could not be served upon her. That court has already exhausted its power in directing, in the decree appointing the receiver, that he shall not be sued without its leave. This is a protection. (2 Red. Law of Railways, p. 16, n. 2, and cases.) If this suit can be maintained against the receiver in the Supreme Court of the District of Columbia, every other suit on any contract or tort whatsoever can be, and the court to which he is answerable is powerless alike to protect him,

or preserve the assets of the corporation, and as is said in *Thompson vs. Scott*, 4 *Dillon*, 513, that under this doctrine "there is no reason why any party claiming satisfaction 'out of the fund may not, without the consent of the re-'ceiver's court, assert his rights in any competent court, 'provided he does not attempt to dispute the possession of 'the receiver, and thus may the decision of the claims and 'controversies involved in the litigation be withdrawn from 'the court of equity where they properly belong, and trans-'ferred to the courts of law."

The case of Chautauque Bank vs. Risley, 19 N. Y., 369, relied on by the plaintiff, was an action of ejectment against a defendant who claimed under a title derived through a receiver, and the plaintiff's title was paramount to that which passed through the receiver, and the case was decided upon the ground that the title of the plaintiff was superior to that held by the purchaser from the receiver. It was the determination of a legal right which could not be affected by the appointment of a receiver. There was never any suit against the receiver, and it is not a case in point; but if it were, we hardly think this court would respect it, as the judge delivering the opinion says, "it may 'be that the case of Wiswall vs. Sampson, 14 Howard, 52, 'goes to the extent of laying down a different doctrine. 'If so, we are constrained to say that we cannot follow that 'decision."

The federal courts are not silent on this question. A case directly in point is that of Hale vs. Duncan, reported in 7 Central Law Journal, 147; Hill, Dist. Judge Northern District of Mississippi. The only question involved was whether the plaintiff had a right to institute a suit against a receiver appointed by the federal court, in the state court, without first having obtained leave of the federal court. The cause, having been removed from the state to the federal court, was dismissed upon the ground that the leave of the court appointing the receiver was a necessary condition precedent to the suit.

See, also, Wiswall vs. Sampson, 14 How., 52.

In the case of *Peale vs. Phipps*, 14 How., 368, Martha Phipps and Mary Bowen filed their petition in the Circuit Court of the United States for the Eastern District of Louisiana, against Peale, trustee of the Agricultural Bank of Mississippi, for rent of property while in the possession of the bank, and damages, &c. Peale had been appointed trustee for collecting the assets of the bank by the Circuit Court of Adams County, in the State of Mississippi, under proceedings set on foot for this purpose, and to have the charter of the bank declared forfeited. To the petition Peale filed exceptions. The second exception set out his appointment as trustee, and claimed that he was only amenable to the court that had appointed him and whose officer he was, and that the U. S. circuit court had no jurisdiction of him in his official character. And this court, speaking through Chief Justice Taney, says: "As 'we think this exception is decisive against the jurisdic-'tion of the Circuit Court of Louisiana, it is not necessary 'in this opinion to set out the other exceptions, or to notice 'the claims he set up by the way of answer and recom-'mendation, if his exceptions were overruled." And further: "We see no ground upon which the jurisdiction of 'the court can be sustained. The plaintiff in error held 'the assets of the bank as the agent and receiver of the 'court of Adams County and subject to its order, and was 'not authorized to dispose of the assets or to pay any debts 'due from the bank except by the order of the court."

See, also, Louisville, New Albany & Chicago R. R. vs. Couble, 46 Ind., 277.

It is submitted, both upon principle and authority, that this case is not an exception to the general doctrine that receivers cannot be sued without the leave of the court appointing them.

LINDEN KENT,
Counsel for Defendant in Error.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~290.~~ 49

HENRY T. FORT, APPELLANT,

vs.

GEORGE ROUSH AND ELIZA ROUSH.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED OCTOBER 18, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 290.

HENRY T. FORT, APPELLANT,

vs.

GEORGE ROUSH AND ELIZA ROUSH.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

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1 In the district court, third judicial district, Lewis and Clarke County, Montana Territory.

GEORGE AND ELIZA ROUSH, PLAINTIFFS,
vs.
HENRY T. FORT, DEFENDANT.

Be it remembered that on the 15th day of March, A. D. 1876, the plaintiffs herein filed their amended and supplemental complaint in the above cause, which was in the words and figures as follows, to wit:

Amended and supplemental complaint.

The Territory of Montana, Lewis and Clarke County, third judicial district court.

GEORGE ROUSH AND ELIZA ROUSH, HIS WIFE,
vs.
HENRY T. FORT, FREDERICK REECE, AND Isaac W. Stoner.

And now come the plaintiffs, George Roush and Eliza Roush, his wife, and by leave of the court for this purpose first had and obtained, file this their amended and supplemental complaint, and allege
2 that on the 23rd day of *of* February, A. D. 1871, the defendant Henry T. Fort commenced an action in the district court aforesaid against these plaintiffs to foreclose a certain mortgage executed on the 22d day of October, A. D. 1869, by the said plaintiffs to the said defendant Henry T. Fort on certain real property hereafter described, owned by the said plaintiffs, Eliza Roush et al., to secure the payment of a certain promissory note executed by the said plaintiffs to the said defendant Henry T. Fort for the sum of two thousand dollars, payable twelve months after date, with interest at three per cent. per month, and that such proceedings were thereafter had that on the 16th day of March, A. D. 1871, a decree was rendered by the said court in the said action for the foreclosure of the said mortgage mentioned to satisfy the amount due on said note, which was adjudged to be $2,895.00.

And the plaintiffs do further allege that upon the said decree a pretended order of sale issued to one W. L. Steele, before that time a sheriff of said county, but whose term of service then had expired, under which order of sale the said Steele, on the 10th day of November,
3 A. D. 1871, did pretend to sell and did sell the property described in said mortgage and decree of foreclosure, and owned and possessed by the said plaintiff Eliza Roush, to the defendants, Henry T. Fort, Isaac W. Stoner, and Frederick Reece, and did give to each of the said defendants a certain paper by him signed, purporting to be a certificate of such sale, in which he assumed to certify that the said Henry T. Fort had purchased the following described property, being certain of the property mentioned in said mortgage, order of sale and decree, to wit, lots 99 and 3 in block 20, on Main street, in the town of Helena, in said county; also lot 7, in block 40; also lots 16 and 17 in block 40, in said town of Helena, in said county, and which proceeded to recite that he, the said Fort, would be entitled to a deed for the same at the expiration of six months from the date of such sale, and did also give to the defendant Isaac W. Stoner a like certificate of sale or pretended certificate of sale to the following portions of said property which was mentioned in said mortgage, decree, and order of sale, to wit, lots

10 and 11 in block No. 40, in said town of Helena, and did give to the defendant Frederick Reece a like certificate of
4 sale or pretended certificate of sale to the following portion of said property described in said mortgage, decree and order of sale, to wit: lot 6, in block No. 40, and lot No. 12, in block No. 40, in said town and county; the foregoing being all the property mentioned in said mortgage, decree or order of sale. And the plaintiffs say that when such sale was made, the defendants therein being plaintiffs, directed that the said Steele, making the same, should sell the said several lots and pieces of property in certain separate pieces or parcels and in a certain order, but the said Steele would pay no attention and yield no obedience to the direction and request of the said defendants, and then and there refused to sell said property in the parcels or order directed, but sold it in an entirely different order, and did sell the business house and lot on Main street first, which was the house and lot which these defendants directed should be sold last. And the plaintiffs, upon their information and belief, allege that if the said property mentioned in said order of sale had been sold in the parcels and order
5 directed by them, it would have brought a much greater sum than it did bring, and that it would not have been necessary to have sold the whole thereof to satisfy the amount due upon the decree.

And the plaintiffs further allege, that after the rendition of the decree in the action upon which the said order of sale was issued, and before the issuance of such order, to wit, on or about the 8th day of July, 1871, the said defendant Henry T. Fort entered into an agreement in writing with these plaintiffs, being the judgment debtors in said action, whereby, for a valuable consideration, the said Fort did agree that in consideration of the assignment of all the rents then due these plaintiffs, or to become due upon tenants occupying and to occupy the premises in said complaint described, the said defendant Fort agreed to collect the same thenceforward, which amounted to about two hundred and fifty dollars per month, and apply the same in payment of the principal sum due on the said decree, on the first day of each and every month, and so long as these plaintiffs would allow the said de-
6 fendant to collect the same, as aforesaid, the said defendant Fort agreed that he would not have the said property sold under his said decree of foreclosure; and the plaintiffs say they did assign to said Fort the rents then due and to become due at the time of making said contract, and thenceforward these plaintiffs did allow the said Fort to collect, and he did collect, the rents then due and thereafter accruing, and plaintiffs in all things did comply with their said agreement; but the said defendant, not regarding his said contract, did, on the day of October, 1871, cause the order of sale aforesaid to issue on said decree, and the said property to be sold thereunder November 10, 1871.

And the plaintiffs say that the only consideration of their agreement that he, the said Fort, might have and collect and apply on his said decree the said rents accrued and to accrue to them, was his said agreement that he would not have said property sold under his said decree.

And the plaintiffs say that the said Fort did collect under the said agreement of the rents accrued, and after said contract was made that did accrue, and which otherwise would have been coming to these
7 plaintiffs, the aggregate amount of $815.00 and more.

And the plaintiffs further say that in consideration of the foregoing stipulations and covenants of the said Fort in his said agreement and the observance thereof on his part, these plaintiffs did agree to pay to him, the said Fort, interest on his said decree at the rate of 2 per

cent. per month from the date of said contract until the same should be fully paid, which interest was to come from the rents so by him, the said Fort, to be collected; and plaintiffs say that of the rents so collected and applied there was the sum of $300.00 applied as interest under said agreement, and the said sale was so made while the said Fort was in the possession and enjoyment of all the rents accruing and which had accrued at the date of the said agreement. And the plaintiffs say that the said Fort, in violation of his said agreement, did cause the said order of sale to issue, and did sell the said property thereunder without crediting the plaintiffs the rents he received thereon under said agreement, and as though the entire sum mentioned in said decree was due, when in truth and in fact a large sum, to wit, the sum of
8 $815.00, had been paid thereon under said agreement, and it was agreed that the rents by him received were to be applied to the reduction and liquidation of the principal first and the interest afterwards.

And the plaintiffs further say that the said defendant Henry T. Fort, contriving and intending to defraud these plaintiffs, did cause to be given out and did state that there was no use of others bidding on said property, as he was going to bid the same in himself. And the plaintiffs say that the said defendant Fort, after the sale aforesaid and after the former trial in this cause in the district court and down to the filing of this amended and supplemental complaint, has continued to receive and is yet continuing to receive rents and profits upon the said property, or some thereof, and is in the enjoyment of other of the said premises, and has so been in such possession ever since the making of the said contract, and enjoying the use and occupation thereof, and the aggregate value of the said use and occupation so being in his possession is more than one thousand dollars, for which he should account to these plaintiffs. And the said plaintiffs further aver that since the filing
9 of the amended complaint in this action and the trial and rendition of the judgment and decree herein adverse to these plaintiffs, they, the said plaintiffs, appeated to the supreme court of said Territory, and that the said cause, having been so appealed, was brought on for a hearing before the said supreme court at the January term thereof, A. D. 1876, and such proceedings were then and there had that the said supreme court by its judgment ordered and adjudged that the decree of the court below be affirmed so far as the same confirmed the sale of the property described in said mortgage, so far as the same was sold to the said defendants Reece and Stoner, and that so far as the judgment and decree hereinbefore rendered confirmed the sale of the said property to the said Fort and giving him, the said Fort, the rents, issues, and profits thereof, the same was reversed with costs, and the sale to be set aside and vacated, and that this action was remanded to this court for further proceedings.

And the plaintiffs say that the sale in violation of the said agreement was a surprise to these plaintiffs, and the same sold for a price grossly inadequate, was inequitable, in violation of the contract
10 of said Fort, who made said contract to secure the rents aforesaid, and when he had so secured the same violated the stipulations which were the consideration of the same. And the plaintiffs further say that the said Fort did divert a large part of the rents so by him collected to other purposes than that agreed upon, and did not apply the same upon the said judgment as by his contract he was bound to do.

And the plaintiffs further say that the said property sold for a large

sum in excess of the amount due the said Fort on said decree, or on any other account whatever.

And the plaintiffs further say and show that when the said Fort procured the order of sale on said decree, and the said Steele proceeded to sell the same, the said order of sale was issued for the sum of $3,400.00 and more, when in truth and in fact there was no more than $2,200.00 due upon said decree, and after said sale the defendant Fort continued in possession of said premises and received the rents, issues, and profits thereof, which belonged, in right and law as well as under the said agreement, to these plaintiffs, and that the amount of said rents
11 so by him received amount to $3,000.

Plaintiffs further allege and charge that the said Steele had no jurisdiction, warrant or authority to make the said sale or give the said certificate; that no right or title to the said property or the possession thereof passed to the purchasers thereunder thereby, but that all the proceedings and acts connected therewith are irregular, illegal, and void; and all the acts of the said Fort, as well as his said order of sale, and the acts of said Steele thereunder, were without legal sanction and are void.

And the plaintiffs do further allege that upon the making of said pretended sale, the said Fort did wrongfully take possession of the property purchased by him, with the buildings thereon, and has continued in possession thereof, and has greatly damaged some thereof; and from other thereof has continued to receive the rents therefrom, has destroyed buildings thereon, and as to the damages so done to said property while in the wrongful possession of the said Fort, it has been damaged at least sixteen hundred dollars in value.

12 And the plaintiffs do further say that the amount of rents received by the said Fort before the said sale from said property assigned to him by these plaintiffs was $815.00, and that the amount of rents and profits received by him after the sale, upon the property purchased by him thereunder, as plaintiffs are informed and believe, was six hundred dollars to the day of May, A. D. 1872, and the value of the use and occupation of the property which said defendant Fort did purchase, and which he did use and occupy, and did not rent from the time of the sale until the filing of this complaint, is and was five hundred dollars.

And the plaintiffs say that the value of the use and occupation of the premises so by the said Fort caused to be sold under said order of sale, and which was bid in by the said Stoner and Reece, from the time of the sale until now, is $10,000.

And the plaintiffs further say that upon the lot 7 in block 40 there was a building when the said Fort sold and took possession thereof, which was of the value of about three hundred dollars, which the said
13 Fort has destroyed; and upon lots 99 and 3, in block 20, there was, when he, the said Fort, took possession thereof under said illegal and fraudulent sale, a house of the value of $1,000, which has been destroyed while in the possession of said Fort and for which he is in law chargeable.

And the plaintiffs say that by reason of the premises, the said Fort is chargeable with the damage so done to said premises, with the value of the foregoing use and occupation, and the amount of the said rents and profits, and that the same should be set off against any balance which may be due upon the said decree; that the said sale should be set aside; the said Fort be held to account for the moneys by him received from said premises for the use thereof, and that he should be charged with

the full value of the use and occupation of the premises which he so caused to be sold at the inadequate price aforesaid.

And the plaintiffs say that in and about the receiving of the rents of the premises mentioned and the possession thereof taken under said agreement, the said Henry T. Fort became and was the trustee of
14 these plaintiffs and should account to them in equity for the same and the proceeds thereof, but he neglects and refuses so to account as such trustee.

Wherefore the plaintiffs pray judgment that the said sale be set aside; that the said decree be declared satisfied; that the said Henry T. Fort be declared and charged as a trustee in and about the possession of the premises described in said mortgage, and the rents, issues, profits, and use and occupation thereof; that he account for the same and all damages which he has committed to the premises while in the possession thereof, and for all waste committed thereon; that he restore the possession of the property by him purchased in the same condition it was when he so unlawfully took possession thereof, or be charged with the damage done thereto while in his possion; that he be charged with the difference between the then actual value of the property sold to the said Stoner and Reece, and the price by them paid therefor, and for such other and further relief as the said plaintiffs may be entitled to in the premises.

W. F. SANDERS, CHUMASERO & CHADWICK,
Plaintiffs' Attorneys.

15 TERRITORY OF MONTANA,
County of Lewis and Clarke, ss:

George Roush, being first duly sworn, deposes and says that he is one of the plaintiffs named in the foregoing amended and supplemental complaint; that he has heard the same read and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

GEORGE ROUSH.

Subscribed and sworn to before me this 14th day of March, 1876.
W. F. CHARWICK,
Notary Public.

And afterwards, to wit, on the 7th day of December, A. D. 1876, the attorneys for plaintiffs moved for judgment on said amended and supplemental complaint.

16 That thereafter, to wit, on the 7th day of December, A. D. 1876, said motion coming on to be heard, and being duly considered by the court, it was ordered that defendants be permitted to answer to the merits of the amended and supplemental complaint upon the payment of all costs; to which said order of court the attorneys for defendant Fort at the time duly excepted as follows, to wit:

EXHIBIT F.—*Exception.*

In the district court, third judicial district, Lewis and Clarke County, Montana Territory.

GEORGE & ELISHA ROUSH, PLAINTIFFS,
vs.
HENRY T. FORT ET AL., DEFENDANTS.

Be it remembered that this cause coming on to be heard upon th

motion of plaintiffs' attorneys for default upon the amended complaint herein, and the following order made herein March 16th, 1876, to wit:

In this cause plaintiffs having filed an amended and supplemental com-
plain therein March 15th, by leave of the court first obtained in
17 open court, it is ordered that defendants plead on or before the morn-
ing of 18th March, A. D. 1876. Defendants' attorneys, Messrs. H. M. Porter, and Woolfolk and Bullard, resisted such application for the reason that there had been no service of a copy of the amended complaint upon the defendant or his attorney as required by law; and also stated professionally to the court that they had been informed by E. W. Toole, esq., the former attorney for said Fort, that no copy of the amended complaint had ever been served upon him, and that he had never waived the service of such copy. E. W. Toole, esq., also stated professionally to the court that he had never received a copy of said amended complaint and had never waived the service of such copy; that he had declined to receive a copy of the amended complaint from A. H. Beattie, clerk, because he had ceased to be an attorney in the case, and had so stated, and had expressly refused to waive service of copy in conversation with plaintiffs' attorneys for the reason that his employment as attorney had ceased; that said Fort resides in the State of Missouri, and that immediately after the January term of the supreme
court, 1876, he had notified said Fort, in writing, of the reversal
18 of said case. A. H. Beattie, clerk, stated that he had been di-
rected to serve a copy of amended complaint upon E. W. Toole, attorney for Fort, but that said Toole told him he need not do so, and, hence, it had not been done. It was conceded that no copy of the amended complaint had been served upon any of the defendants or upon any of their attorneys.

Thereupon defendant Fort's attorneys asked leave to plead, and desired to file a motion to strike the amended complaint from the files, for the reason that such amendment entirely changed the nature and character of the action and involved a change of the parties thereto. But the court refused to permit any such motion to be filed, and would only permit defendant to answer said amended complaint upon the payment of all costs that had accrued in said cause; to which action of the court in refusing to permit the defendant Fort's attorneys to file said motion, and in imposing the terms aforesaid, the said defendant Fort's attorneys duly excepted, and ask that such exception be signed, sealed, and made a part of the record, which is done.

D. S. WADE, *Judge.*

Thereafter, to wit, on Jan'y 21, 1877, said deft. Fort filed his answer
to said amended & suppl. compl't, as follows, to wit:
19 And thereafter, to wit, on the 21st day of Jan'y, A. D. 1877,
the said defendant Fort, in pursuance of said order, filed his answer to said amended and supplemental complaint, which said answer is in words & figures as follows, to wit:

Answer (separate) of def't Henry T. Fort to amended & supplemental complaint.

In the district court of the third judicial district of the Territory of Montana, in and for the county of Lewis and Clarke.

GEORGE ROUSH AND ELIZA ROUSH, PLAINTIFFS,
vs.
HENRY T. FORT, FREDERICK REECE, AND Isaac W. Stoner, defendants.

And now comes Henry T. Fort, one of the defendants above named, by H. M. Porter, and Woolfolk & Bullard, his attorneys, appearing specially by reason of the order of the court in the premises, and reserving all objections to the sufficiency of the service of a copy of the amended and supplemental complaint of plaintiffs upon this defendant or his attorneys, and for his answer to said amended and supplemental complaint—

20 Admits the institution by this defendant of the action for the foreclosure of the mortgage mentioned in said amended and supplemental complaint, and that a decree was rendered by said court for the foreclosure of said mortgage as alleged in said amended and supplemental complaint.

Admits that the property described in said mortgage and decree was sold by said W. L. Steele to the persons at the time and in the amounts substantially as set forth in said amended and supplemental complaint, and that certificates of sale were issued to the respective purchasers of said property at said sale; but defendant denies that at the time of the issuing of said order of sale or at the time of said sale by the said Steele the term of office of said W. L. Steele as sheriff of said Lewis and Clarke County had expired, but defendant alleges that said order of sale was regularly sued out of the office of the clerk of said district court, and under the seal of said district court, to the said W. L. Steele, who then was, and at the date of said sale continued to be, the sheriff of said county of Lewis and Clarke, and had full power and authority to make said sale, and that as such sheriff the said Steele sold said property and gave to the purchasers thereof at said sale certificates of

21 their respective purchases as aforesaid, and that said sale was regular and conformable to law.

Denies that when said sale was made, or at all, the plaintiffs or either of them gave any directions to said sheriff as to the manner or order in which he (the said sheriff) should sell said property, and denies that said sheriff failed or refused to obey said or any directions of plaintiffs or either of them in conducting said sale, but alleges that in all respects said sale was regularly and properly conducted.

Denies that if said property or any part thereof had been sold by said sheriff in the parcels or order mentioned in said amended and supplemental complaint, or in any other parcels or order, it would have brought any greater sum than it did bring at said sale, or that it would have been unnecessary to have sold the whole of said property to satisfy the amount due upon said decree.

Admits that on or about the 8th day of July, 1871, the plaintiffs and this defendant entered into an agreement in writing, but denies that by the terms of said agreement, or at all, this defendant for the consideration or upon the conditions, or for the time mentioned in said amended

and supplemental complaint, or for any other consideration, or
22 upon any other conditions, or for any other time whatever, save and except until after the first day of October, 1871, agreed that he would not have said property sold under his said decree.

Denies that the rents turned over to this defendant by plaintiffs under said agreement, or at all, amounted to the sum of two hundred and fifty dollars per month, or to any greater or larger sum than two hundred and four dollars per month, and denies that the aggregate amount of said rents received or collected by the defendant prior to the time of said sale was any greater or larger sum than eight hundred and fifteen dollars.

Denies that by the terms of said agreement at all this defendant ever agreed to apply said rents first to the principal sum due upon said decree, and afterwards to the interest thereon, but alleges that under said agreement, by the terms thereof, the amount due on said judgment and decree was to bear interest from the first day of July, 1871, until fully paid, at the rate of two and one-half per cent. per month; said rents were to be applied first to the payment of the interest on said judgment and decree, and afterwards to the principal sum due thereon.

23 Denies that said plaintiffs upon their part complied with said agreement.

Denies that said defendant in any manner or at all disregarded or violated said agreement or any part thereof.

Denies that this defendant caused said property to be sold without crediting plaintiffs with said sum of $815.00 rents, but alleges that said sum of $815.00 was applied to the paymount of the amount due upon said decree and to the payment of taxes due upon said property, save and except three hundred and twenty $\frac{46}{100}$ dollars of said sum, which said sum was duly credited on the said indebtedness due from said plaintiff to this defendant, but through inadvertance and mistake was not endorsed upon said decree prior to the issuing of said order of sale.

Denies that this defendant ever caused to be given out or made the statements alleged in said amended and supplemental complaint, or ever at all attempted to or did prevent any person or persons from bidding on said property, or any part thereof, at said sale.

Denies that at the times mentioned in said amended and supplemental complaint, or at any other time, this defendant has received the rents or enjoyed the use or occupation of said property, or any
24 part thereof, save and except as hereinafter admitted and set forth; and denies that the aggregate value of the use and occupation of that portion of said property which has been or is in the possession, use, or enjoyment of this defendant is one thousand dollars, or any other sum.

Denies that said sale was a surprise to plaintiffs or was in violation of said agreement, or that said property at said sale sold for an inadequate or inequitable price; or that defendant diverted any part of said rents in violation of said agreement.

Denies that said property at said sale sold for any greater or larger amount in excess of the amount due this defendant than the sum of one hundred and seven & $\frac{76}{100}$ dollars.

Denies that at the date of said sale there was only due upon said decree the sum of $2,200.00, but alleges that there was then due thereon, after deducting all credits and payments to which the plaintiffs were entitled, the sum of $3,055.79.

Denies that after said sale this defendant continued in possession of or received the rents, issues or profits of said property, or any part

thereof, save and except so much of said property as was pur-
25 chased by him at said sale as above stated.

Denies that the possession, rents, issues, or profits of said property, or any part thereof, belonged to said plaintiffs.

Denies that the said rents received by this defendant, after his purchase of said property, amount to the sum of $3,000.00, or any greater or larger sum than $110.00.

Denies that he has damaged or destroyed any portion of said property to the amount of sixteen hundred dollars, or any other sum or amount whatever.

Denies that this defendant received after said sale, and up to the day of May, A. D. 1872, from the rents or profits of the property purchased by him at said sale, the sum of six hundred dollars, or any other or greater sums than one hundred and ten dollars.

Denies that the value of the use and occupation of the remainder of said property purchased by defendant at said sale, and which was not rented by defendant from the date of said sale to the filing of said amended and supplemental complaint, was or is $500.00, or any other sum whatever.

Denies that the value of the use and occupation of the said
26 property purchased by said Stoner and Reece from the time of said sale to the date of the filing of said amended and supplemental complaint, was or is $10,000, or any other or greater sum than $2,000, as defendants verily believes.

Denies that at the date of said sale, or at the date when this defendant took possession of said lot 7, in block 40, the building upon said lot was of the value of $300.00, or of any other or greater value than nine dollars, and denies that this defendant ever destroyed said building.

Denies that at the time of said sale, or at the time of when this defendant took possession of said lots 99 and 3, in block 20, there was on said lots 99 and 3, or either of them, a house of the value of $1,000.00, and denies that said house was of any other value or greater value than seven hundred dollars, and denies that this defendant is chargeable with the destruction of said house, or any part thereof; but alleges that the said house was, on the 9th day of January, A. D. 1874, without any fault or negligence of this defendant, destroyed by fire during a general conflagration in the said town of Helena.

Denies that this defendant ever refused to account to plaintiffs
27 for said rents, but alleges that he has ever been ready and has offered so to do.

Denies that this defendant is liable for the rents or profits of said property purchased at said sale by said Reece and Stoner, or either of them, or any part of said property, and denies that he (this defendant) is liable, in any manner whatever, on account of the purchase of said property at said sale by the said Reece and Stoner, or either of them.

The defendant, for further answer to the complaint of the plaintiffs, alleges that on the day of April, A. D. 1872, the original action in this case was instituted in equity by the plaintiffs against this defendant and his co-defendants, Frederick Reece and J. W. Stoner, for the purpose of setting aside the sheriff's sales of the property described in the amended and supplemental complaint herein, and embracing the same causes of action as are set forth in said amended and supplemental complaint; that said sales had been made under and by virtue of a decree of foreclosure rendered in favor of this defendant, and against said plaintiffs, and that after the institution of this action, to wit, on the 30th day of November, A. D. 1872, upon the application of the plaint-

28 iffs' attorneys, and by agreement between the attorneys for plaintiffs and defendants, an order was made therein by the said district court referring said cause to W. E. Cullen, esq., master in chancery, to take the testimony and report his findings, together with the testimony to the court at the next term thereof. That in pursuance of said order, the said Cullen proceeded to hear the said cause, and reduce the testimony given therein to writing, and after the whole of the testimony offered for plaintiffs and defendants had been taken, and the argument of their respective counsel, the said Cullen made his report of said testimony and his findings thereon to the court, which said report and findings are hereunto annexed, marked Exhibit A, and made a part of this answer. That upon said report the district court, upon motion of said defendants' attorneys, made the following order, to wit:

In the district court, 3d judicial district, Lewis and Clarke County, Montana Territory. In equity.

GEORGE ROUSH ET AL., }
vs. }
HENRY T. FORT ET AL }

29 Be it remembered that plaintiffs' motion to set aside the master's report herein coming on to be heard, and at the same time said defendants' motion for a confirmation of the sale also coming on to be heard, and it appearing to the satisfaction of the court that the plaintiffs have wholly failed to make out their case, and that the facts set up in their amended complaint herein are untrue in every material respect, it is therefore ordered that said plaintiffs' motion be overruled, and said defendants' motion sustained, and that said sale be affirmed, and defendants have the rents, issues, and profits of said property from the date of such sale.

D. S. WADE,
Judge 3rd Judicial District.

Defendant further states that plaintiffs appealed from said order to the supreme court of this Territory; and upon the hearing of said appeal the said order was affirmed as to the property purchased by said Reece and Stoner, and only reversed as to the property purchased by this defendant.

Defendant further states that all the material issues now pending in the amended complaint herein were pending also at the time of
30 the trial aforesaid before W. E. Cullen, esq., save and except the question as to the rents and profits of the property purchased by this defendant since the date of such purchase; and that all said issues were settled and adjudicated in said trial before said Cullen. And defendant avers that all the causes of action embraced in the amended complaint herein have been already settled and adjudicated as aforesaid (with the exception above stated), and cannot be retried in this action.

Defendant further alleges that he is not liable to the plaintiffs for the rents, issues, and profits of the property purchased as aforesaid by said Reece and Stoner, or in any other manner, on account of the sale of said property so purchased by them, and which said purchase was affirmed as aforesaid, but avers that he is only answerable for the rents, issues, and profits of the property purchased by him since the date thereof, and wch purchase was set aside as aforesaid.

Defendant further states that the following property was purchased by him at said sheriff's sale, to wit, lots 99 and 3, in block 20, and lots 7-16 and 17, in block 40, in said town of Helena; that there were
31 no improvements upon any of said lots except a portion of a small frame house of the value of about nine dollars, situate upon lot seven (the remaining portion of said house being upon an adjoining lot owned by the said Frederick Reece), and also a frame building of the value of about seven hundred dollars, situate upon said lots 99 and 3; that said portion of the small frame house on lot seven had no usable value whatever, and the frame building on lots 99 and 3 was destroyed by fire during a general conflagration, which destroyed a large portion of the town of Helena on the 9th day of January, A. D. 1874; that since the destruction of said building this defendant has received no rents or profits from any portion of the property purchased at said sheriff's sale; that all the rents received by defendant from said property from the date of said purchase at sheriff's sale until the destruction of said building by fire did not exceed one hundred and ten dollars; that the defendant has expended more than that amount upon said property since the date of said purchase at sheriff's sale, in the payment of taxes and repairs thereon, to wit, about the sum of one hundred
32 and twenty-five dollars.

Defendant, for further answer to plaintiff's complaint, states that on the 10th day of November, 1871, the date of the sheriff's sale aforesaid, after allowing plaintiff's credit for all rents collected and payments made, the judgment in his favor and against said plaintiffs, amounted to $3,055.79, besides costs, which were $236.45, all of which will more fully appear by the report of the said W. E. Cullen, hereunto annexed, and to which reference is hereby made; that the property purchased by said Reece and Stoner sold for $1,800.00; that, after crediting the judgments of defendant with the amount of said sales to Reece and Stoner, there was left a balance due him upon said judgments of $1,255.79, besides costs as aforesaid, and making a total with said costs of $1,492.24. That by the terms of the agreement aforesaid between plaintiffs and defendant the amount evidenced by said judgments was to bear interest at the rate of 2½ per cent. per month until paid. That since said sheriff's sale has been set aside the said defendant has acquired no title or possession thereunder to any of said property
33 purchased by him, and therefore prays the honorable court that the judgments or decrees aforesaid be revived for the aforesaid balance of $1,492.24 due him thereon at the date of said sale, after crediting the same with the amount of the sales to Reece and Stoner as aforesaid, and that defendant recover legal interest on said balance from the date of said sale. That defendant also recover judgment against the plaintiffs for the difference between legal interest on said balance and the sum of 2½ per cent. per month thereon from the date of said sale which plaintiffs agreed to pay. That defendants have an order of sale against the aforesaid property remaining unsold to pay and satisfy the aforesaid balance due on said judgments or decrees, together with legal interest thereon from the 10th day of November, A. D. 1871. That he recover his costs and disbursements in this behalf expended, and have such other or further relief as to the honorable court may seem just and proper.

H. M. PORTER, WOOLFOLK & BULLARD,
Attorneys for Defendant Fort.

STATE OF MISSOURI,
County of Randolph, ss:

34 Henry T. Fort, being first duly sworn, deposes and says that he is one of the defendants in the above cause; that he has heard the foregoing answer read and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

H. T. FORT.

Subscribed and sworn to before me this 11th day of January, A. D. 1877.

In testimony whereof I have hereto set my hand and official seal the day & date aforesaid.

[SEAL OF COURT.] C. H. HOUSE,
Clerk of Circuit Court, Randolph County, Missouri.

EXHIBIT A.

In the district court of the 3d jud. district.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

GEORGE ROUSH ET AL.
vs.
HENRY T. FORT ET AL.

35 This cause having been referred to the undersigned, a master in chancery of said court, by an order duly made and entered therein on the day of November, A. D. 1872, have respectfully to report that, by agreement of parties, the said cause was brought on to be heard before me, at my office in Helena, M. T., on the 14th day of December, A. D. 1873, the parties to said action and their respective attorneys being present. The hearing of said cause not being completed on the said 14th day of December, the same was continued from day to day, and was completed on the 17th day of the same month. The testimony given by the witnesses upon such hearing was reduced to writing by myself, and is comprised in the 72 pages of testimony herewith returned as a part of this report. After duly considering said testimony and hearing the arguments of counsel thereon, I find the following to be the facts in said cause:

1st. That prior to the commencement of the sale complained of in plaintiff's bill, the plaintiff, George Roush, gave to the officer making such sale directions as to the manner and order of making said sale, which were faithfully observed by the officer; but that, during the
36 progress of the sale, the said plaintiff requested the said sheriff to split up or divide a certain lot then about to be sold and reserve from sale the rear portion of said lot with which request the sheriff declined to comply.

2nd. That upon such sale the property brought reasonably fair prices.

3. That the defendants named in plaintiff's bill were the purchasers thereof.

4. That prior to said sale and on the 8th of July, A. D. 1871, the plaintiffs and the defendant, Henry T. Fort, entered into an agreement

in writing whereby the said defendant agreed not to sell the said property until after the 1st day of October then next ensuing, in consideration whereof the said plaintiffs agreed to, and did turn over to said defendant the rents, issues, and profits of said property, and agreed to allow the said defendant interest upon two certain judgments then held by him, at the rate of two and one-half per cent. per month from the first day of July, 1871; that, by the terms of said agreement, the rents, issues and profits of said property, after being collected by said defendant were, at the end of each and every month, to be endorsed as a credit
37 upon the aforesaid indebtedness as a payment of the interest and principal thereof or any other indebtedness the said defendant may hold against the said plaintiffs or their property.

5. That in pursuance of said agreement, the said defendant forbore to sell the said property until after the time agreed upon, to wit, until the 10th day of November, 1871, at which time the said sheriff's sale took place.

6. That by virtue of said agreement the said defendant, H. T. Fort, collected the sum of $815.00.

7. That he did not at the end of each and every month endorse upon the said indebtedness the amounts collected by him, but that he applied a portion thereof to the payment of interest accruing under the terms of said agreement; a portion thereof to the redemption of said property from a tax sale at which he had purchased the same; and a portion thereof to the payment of the taxes upon the said property for the year A. D. 1871. The defendant, Fort, claimed two other items of credit as against the $815 collected by him, viz: a commission of ten per cent. upon the amounts collected for collecting the same, and the amount of a certain note against the plaintiff, Geo. Roush, purchased by said defend-
38 ant of one W. L. Steele, neither of which seem to your referee to be within the purview of the agreement mentioned in the 4th finding herein.

8. That said sale was made by virtue of two certain orders of sale, one issued upon a certain decree of this court in the case of Henry T. Fort vs. Geo. & Eliza Roush, made and entered therein on the 16th day of March, A. D. 1871, for the sum of two thousand eight hundred and ninety-five & $\frac{20}{100}$ dollars and costs, and the other in favor of J. W. Hartwell et al., and against the said Geo. & Eliza Roush, made and entered on the 1st day of November, A. D. 1870, for the sum of two hundred and thirty-eight dollars and costs; both of which said judgments or decrees were the property of Henry T. Fort.

9. That at the time of said sale there was due the said Henry T. Fort upon said judgment the sum of $3,055.79, and that he caused the said property to be advertised and sold to satisfy a sum greater than was then due him thereon, to wit, for the full sum for which said judgments were rendered, with interest thereon from the respective dates of their rendition. In illustration of this, the following account is submitted:

39 Judgment of H. T. Fort, damages	$2,895	90
Clerk's costs	37	60
Sheriff's do	6	70
Int. on same, at 10 % per an., from M'ch 16 to July 1, '71	85	75
Hartwell judgment, damages	238	00
Clerk's costs	23	40
Sheriff's do	5	10
Costs in court below	30	45

And thereupon, on the 22nd day of May, A. D. 1877, the defendant Fort filed his motion to strike plaintiffs' said motion from the files, which motion of defendant is in the words and figures following, to wit:

Motion of defendants.

In the Territorial district court, 1st judicial district, Lewis & Clarke County, Montana Territory.

44 GEORGE ROUSH & ELIZA ROUSH, PLAINTIFFS,
vs.
HENRY T. FORT, FREDERICK REECE, AND Isaac W. Stoner, defendants.

Now comes the defendant Henry T. Fort, by his attorneys, H. M. Porter & Woolfolk & Bullard, and moves the honorable court, to strike from the files the motion to strike out parts of defendant's answer, for the reason that said motion fails to set forth what portions of such answer are included in or intended to be included in it.

H. M. PORTER AND WOOLFOLK & BULLARD,
Attorneys for H. T. Fort.

And on the 13th day of June, 1877, this cause coming on to be heard upon defendant Fort's said motion last above mentioned, the court required the plaintiffs to amend their motion by inserting in same the matter asked to stricken from the answer. Thereupon on the said 13th day of June, A. D. 1877, the plaintiffs filed their amended motion to strike out part of defendant Fort's answer; which said amended motion is in the words and figures following, to wit:

Amended motion of plaintiffs

Montana Territory, Lewis and Clarke County. In district court, 3rd judicial district.

45 GEORGE ROUSH & ELIZA ROUSH
vs.
HENRY T. FORT, FREDERICK REECE, & ISAAC W. Stoner.

The plaintiffs come and move the court to strike from the answer of Henry T. Fort to the amended and supplemental complaint of plaintiffs the following allegation therein, to wit: "Defendant, for further answer to plaintiffs' complaint, states that on the 10th day of November, 1871, the date of the sheriff's sale aforesaid, after allowing plaintiff credits for all such rents collected and payments made, the judgment in his favor and against said plaintiffs amounted to $3,055.74, besides costs, which were $236 $\frac{45}{100}$, all of which will more fully appear by the report of the said William E. Cullen, hereunto annexed, and to which reference is hereby made; that the property purchased by said Reece and Stoner sold for $1,800.00; that after crediting the judgment of the defendant with the amount of said sales to Reece & Stoner, there was left a balance due him upon said judgment of $1,255 $\frac{79}{100}$, besides costs as aforesaid, and making a total with said costs, of $1,492.24;

46 that by the terms of the agreement aforesaid between plaintiffs and defendants, the amount evidenced by said judgment was to bear interest at the rate of two and one-half per cent. per month, until paid. That since said sheriff's sale has been set aside, the said defendant has acquired no title or possession thereunder to any of said property purchased by him; and therefore prays the honorable court that the judgment or decree aforesaid be revived for the aforesaid balance of $1,492.24 due him thereon at the date of said sale, after crediting the same with the amount of sales to Reece and Stoner as aforesaid, and defendant recover legal interest on said balance from the date of said sale," for the reason that said allegation is redundant, irrelevant, and immaterial.

CHUMASERO, & CHADWICK
& SANDERS & CULLEN,
Attorneys for Plaintiff.

The defendant Fort's attorneys, upon said last named day, and at the time of filing said amended motion, asked the court that the hearing of said amended motion be postponed until the next or succeeding day
47 for the reason that the rules of the court so required. The court refused to so postpone the hearing of said motion, and directed that the said motion should be heard immediately; and did then and there immediately proceed to hear arguments of counsel on said motion. To which action of the court in refusing to postpone the hearing of said motion as aforesaid, the defendant Fort, by his attorneys, then and there duly excepted, and asks that this his bill of exceptions be signed and sealed and made a part of the records in this cause, which is done accordingly.

D. S. WADE, *Judge.* [SEAL.]

That afterwards, to wit, on the day of June, the court having considered said motion to strike out parts of defendants' answer, sustained said motion, to which action of the court in sustaining said motion defendant Fort's attorneys duly excepted at the time.

And thereafter, to wit, on the 16th day of June, A. D. 1877, the defendant Fort, by his attorneys, made application to the court to file an amendment to his answer, said amendment to be in lieu of that part of the answer stricken out by the court; which said application
48 and amendment so presented to the court are in words and figures as follows, to wit:

In the district court, third judicial district, Lewis and Clarke County, Montana Territory.

GEORGE ROUSH & ELIZA ROUSH, PLAINTIFFS,
against
HENRY T. FORT ET AL., DEFENDANTS.

Be it remembered that on the 16th day of June, A. D. 1877, the defendant Fort asked leave of the court to amend his answer in this action, the said amendment to be in lieu of that part of the said defendants answer stricken out by the court, which said proposed amendment was, on the said 16th day of June, A. D. 1877, presented to the court, and is hereto attached, marked Exhibit A, and is in words and figures as follows, to wit:

In the district court, third judicial district, Lewis and Clarke County Montana Territory.

GEORGE ROUSH & ELIZA ROUSH, PLAINTIFFS,
vs.
HENRY T. FORT ET AL., DEFENDANTS.

49 Now comes the defendant herein, Henry T. Fort, by his attorneys, H. M. Porter & Woolfolk & Bullard, and asks leave of court to file the following amendment to his answer herein, said amendment to be inserted in lieu of that portion of said defendant's answer stricken out by the court, to wit:

Defendant, for further answer to plaintiffs' complaint, states that on the 10th day of November, 1871, the date of the sheriff's sale aforesaid, after allowing plaintiff credit for all such rents collected and payments made, the judgments in his favor and against said plaintiffs amounted to $3,055.74 besides costs, which were $236.45, all of which will more fully appear by the report of said Wm. E. Cullen hereunto annexed, and to which reference is hereby made; that the property purchased by said Reece and Stoner sold for $1,800.00; that after crediting the said judgment of defendant with the amount of said sales to Reece and Stoner, there was left a balance due him upon said judgment of $1,255.79 besides costs as aforesaid, and making a total with said costs of $1,492.24, and that said amount, and lawful interest thereon from the said 10th day of November, 1871, is still due and unpaid to this defendant
50 from the plaintiffs; that since said sheriff's sale has been set aside the said defendant has acquired no title or possession thereunder to any of said property purchased by him at sheriff's sale as aforesaid, and therefore prays the honorable court that the judgment or decrees aforesaid be revived for the aforesaid balance of $1,492.24 due him thereon at the date of said sale, after crediting the same with the amount of the sales to Reece and Stoner as aforesaid, and that defendant recover legal interest on said balance from the date of said sale; that defendant is still the owner and holder of said balance due on said decrees from plaintiffs to him, and that no portion of said balance has ever been paid, but that the same, with lawful interest as aforesaid, is still due and unpaid from said plaintiffs to this defendant. Defendant further states that said plaintiffs are wholly insolvent and irresponsible. Wherefore defendant prays the honorable court that whatever sum, if any, that may be found due the plaintiffs from this defendant on account of the property, or the rents thereof, purchased as aforesaid by this defendant, may be credited upon the said balance due as aforesaid to
51 this defendant from the plaintiffs, and that defendant have an order of sale against the aforesaid property remaining unsold to pay and satisfy the aforesaid balance due on said judgments or decrees, together with legal interest thereon from the 10th day of November, 1871.

H. M. PORTER, WOOLFOLK & BULLARD,
Attorneys for Defendant Fort.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

H. M. Porter, being duly sworn, says as follows: I am one of the attorneys of the defendant in this action. I have read the foregoing amendment to the answer of defendant, Fort, in this action, and know the contents thereof, and that it is true, of my own knowledge. The

reason this verification is not made by defendant, Fort, is, he is not within the county of Lewis and Clarke, which is the county where I reside; that said Fort is in the State of Missouri.

H. M. PORTER.

Subscribed and sworn to before me this 16th day of June, A. D. 1877.

A. H. BEATTIE, *Clerk.*

52 The court denied the said defendant's said application for leave to amend his said answer, and refused to allow said defendant to so amend his said answer. To which action of the court in refusing to allow said defendant to so amend his said answer the said defendant at the time duly excepted, and asks that this, his bill of exceptions, be signed, sealed, and made a part of the records in this action, which is done this 27th day of June, 1877.

D. S. WADE, *Judge.*

That on the 12th day of June, A. D. 1877, defendant, Fort, also moved the court for judgment upon the pleadings, as to all matters passed upon by W. E. Cullen, referee; which said motion is in words and figures as follows, to wit:

Defendant's motion for judgment.

In the district court, 3rd judicial district, Lewis and Clarke County, Montana Territory.

GEORGE & ELIZA ROUSH, PLAINTIFFS,
vs.
HENRY T. FORT ET AL., DEFENDANTS.

Now comes the above defendant, by his attorneys, H. M. Por-
53 ter, Woolfolk & Bullard, and moves the court for judgment on the pleadings as to the property and the rents and profits thereof purchased by Frederick Reece and J. W. Stoner, and fully set forth in said complaint; also as to all the issues made in said pleadings concerning the terms of the agreement between plaintiffs and defendant, the sheriff's sale thereunder, the regularity and legality of such sale, for the following reasons, to wit:

First. The pleadings and records of this court disclose the fact that all said issues have been fully adjudicated and settled in this action between plaintiffs and defendant. Also—

Second. That all the issues included in said cause have been fully adjudicated and settled save and except the issue as to the amount realized by defendant from the rents and profits of the property purchased by him, and the sale of which has been set aside.

H. M. PORTER, WOOLFOLK & BULLARD,
Att'ys for Defendant.

Which said motion being considered by the court was overruled; but the court further held that the issues settled by W. E. Cullen,
54 referee, were *res adjudicata*, and that said defendant, Fort, could not be held to account for the rents and profits of the property purchased by Frederick Reece and Isaac W. Stoner.

That afterwards, to wit, on the 18th day of June, 1877, the cause coming on for trial, the court made the following order of reference, to wit:

In the district court, third judicial district, Lewis and Clarke County Montana Territory.

GEORGE ROUSH & ELIZA ROUSH, PLAINTIFFS,
vs.
HENRY T. FORT ET AL., DEFENDANTS.

49 Now comes the defendant herein, Henry T. Fort, by his attorneys, H. M. Porter & Woolfolk & Bullard, and asks leave of court to file the following amendment to his answer herein, said amendment to be inserted in lieu of that portion of said defendant's answer stricken out by the court, to wit:

Defendant, for further answer to plaintiffs' complaint, states that on the 10th day of November, 1871, the date of the sheriff's sale aforesaid, after allowing plaintiff credit for all such rents collected and payments made, the judgments in his favor and against said plaintiffs amounted to $3,055.74 besides costs, which were $236.45, all of which will more fully appear by the report of said Wm. E. Cullen hereunto annexed, and to which reference is hereby made; that the property purchased by said Reece and Stoner sold for $1,800.00; that after crediting the said judgment of defendant with the amount of said sales to Reece and Stoner, there was left a balance due him upon said judgment of $1,255.79 besides costs as aforesaid, and making a total with said costs of $1,492.24, and that said amount, and lawful interest thereon from the said 10th day of November, 1871, is still due and unpaid to this defendant
50 from the plaintiffs; that since said sheriff's sale has been set aside the said defendant has acquired no title or possession thereunder to any of said property purchased by him at sheriff's sale as aforesaid, and therefore prays the honorable court that the judgment or decrees aforesaid be revived for the aforesaid balance of $1,492.24 due him thereon at the date of said sale, after crediting the same with the amount of the sales to Reece and Stoner as aforesaid, and that defendant recover legal interest on said balance from the date of said sale; that defendant is still the owner and holder of said balance due on said decrees from plaintiffs to him, and that no portion of said balance has ever been paid, but that the same, with lawful interest as aforesaid, is still due and unpaid from said plaintiffs to this defendant. Defendant further states that said plaintiffs are wholly insolvent and irresponsible. Wherefore defendant prays the honorable court that whatever sum, if any, that may be found due the plaintiffs from this defendant on account of the property, or the rents thereof, purchased as aforesaid by this defendant, may be credited upon the said balance due as aforesaid to
51 this defendant from the plaintiffs, and that defendant have an order of sale against the aforesaid property remaining unsold to pay and satisfy the aforesaid balance due on said judgments or decrees, together with legal interest thereon from the 10th day of November, 1871.

H. M. PORTER, WOOLFOLK & BULLARD,
Attorneys for Defendant Fort.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

H. M. Porter, being duly sworn, says as follows: I am one of the attorneys of the defendant in this action. I have read the foregoing amendment to the answer of defendant, Fort, in this action, and know the contents thereof, and that it is true, of my own knowledge. The

reason this verification is not made by defendant, Fort, is, he is not within the county of Lewis and Clarke, which is the county where I reside; that said Fort is in the State of Missouri.

H. M. PORTER.

Subscribed and sworn to before me this 16th day of June, A. D. 1877.

A. H. BEATTIE, *Clerk.*

52 The court denied the said defendant's said application for leave to amend his said answer, and refused to allow said defendant to so amend his said answer. To which action of the court in refusing to allow said defendant to so amend his said answer the said defendant at the time duly excepted, and asks that this, his bill of exceptions, be signed, sealed, and made a part of the records in this action, which is done this 27th day of June, 1877.

D. S. WADE, *Judge.*

That on the 12th day of June, A. D. 1877, defendant, Fort, also moved the court for judgment upon the pleadings, as to all matters passed upon by W. E. Cullen, referee; which said motion is in words and figures as follows, to wit:

Defendant's motion for judgment.

In the district court, 3rd judicial district, Lewis and Clarke County, Montana Territory.

GEORGE & ELIZA ROUSH, PLAINTIFFS,
vs.
HENRY T. FORT ET AL., DEFENDANTS.

Now comes the above defendant, by his attorneys, H. M. Por-
53 ter, Woolfolk & Bullard, and moves the court for judgment on the pleadings as to the property and the rents and profits thereof purchased by Frederick Reece and J. W. Stoner, and fully set forth in said complaint; also as to all the issues made in said pleadings concerning the terms of the agreement between plaintiffs and defendant, the sheriff's sale thereunder, the regularity and legality of such sale, for the following reasons, to wit:

First. The pleadings and records of this court disclose the fact that all said issues have been fully adjudicated and settled in this action between plaintiffs and defendant. Also—

Second. That all the issues included in said cause have been fully adjudicated and settled save and except the issue as to the amount realized by defendant from the rents and profits of the property purchased by him, and the sale of which has been set aside.

H. M. PORTER, WOOLFOLK & BULLARD,
Att'ys for Defendant.

Which said motion being considered by the court was overruled; but the court further held that the issues settled by W. E. Cullen,
54 referee, were *res adjudicata*, and that said defendant, Fort, could not be held to account for the rents and profits of the property purchased by Frederick Reece and Isaac W. Stoner.

That afterwards, to wit, on the 18th day of June, 1877, the cause coming on for trial, the court made the following order of reference, to wit:

Order of reference.

In the third judicial district court, Lewis & Clarke county, Montana Territory.

GEORGE ROUSH & ELIZA ROUSH, PLAINTIFFS,
vs.
HENRY T. FORT, IMPLEADED WITH ISAAC W. Stoner and Fred'k Reece, deft's.

This cause coming on to be tried before a jury, and it appearing that the issues to be determined involved matters of accounting between the parties, it is thereupon ordered that the same be referred to a referee hereinafter to be named, whose duty it shall be to hear and reduce to writing the testimony and, together with his findings, report the same to this court, as follows:

First. To ascertain the amount due the plaintiffs from the de-
55 fendant, Fort, as is shown by an examination and inspection of the master's report, heretofore filed herein, together with interest thereon, at the rate of ten per cent. per annum, from the time such money was received by Fort to the time of filing this report.

Second. For the value of the rents, issues and profits of the property purchased by Fort at sheriffs sale on the 10th day of November, 1871, which he received, or should, or might have received on account of the occupancy of the said premises, said Fort to be charged as for the occupancy thereof from the 10th day of November, 1871, to the 5th day of February, A. D. 1876.

Third. For such actual direct damages, if any, as the plaintiffs have suffered for and on account of the issuance of the execution or order of sale, in the case of Henry T. Fort against plaintiffs and others for the sum of $3,342.68, which they would not have suffered had such execution or order of sale been for $3,022.22, the actual amount due from plaintiffs to the defendant, Fort, as found in said report of said master in chancery upon the two decrees or judgments on which the same was sold.

56 Fourth. For such damage or injury, if any, as was done to the said premises while the plaintiffs were excluded from the possession thereof, and during the entire period mentioned in item second herein, separating the damage so done to said premises during said period by inevitable accident from the other damage, and as to the damage so occurring by inevitable accident during such period, the liability of the said Henry T. Fort, defendant, therefor is reserved for further consideration.

It is further ordered that, for the purpose of ascertaining the amount of the four several items of money for which the defendant Fort should account to the said plaintiffs, the referee proceed forthwith to take the testimony produced by the parties respectively thereon, and that he report separately the three first items thereof; and as to the fourth item as herein before directed.

And it is further ordered that the plaintiffs produce their testimony before the referee on or before the 22nd day of June, 1877, giving to the adverse party reasonable notice of the time and place of taking the same, and that the defendant, Fort, thereupon produce his testimony before such referee on or before the 23rd day of June, 1877, giving to
57 the adverse party reasonable notice of the time and place of taking such testimony, and that the plaintiffs shall forthwith

thereafter produce their rebutting testimony, if any, and that the referee report such testimony, together with his findings thereon to this court on or before the 23rd day of June, 1877.

And it is further ordered that Isaac R. Alden be and he is hereby appointed such referee.

DECIUS S. WADE, *Judge.*

To which order of reference the defendant, Fort, by his attorneys at the time duly excepted as follows, to wit:

EXHIBIT I.

Bill of exceptions.

In the district court, third judicial district, Lewis and Clarke County, Montana Territory.

GEORGE ROUSH & ELIZA ROUSH, PLAINTIFFS,
vs.
HENRY T. FORT ET AL., DEFENDANTS.

In this action, on motion of the plaintiffs the court submitted to Isaac R. Alden, the referee, certain items and issues to be found by the said referee, which order of reference is in words and figures as follows, to wit:

58 This cause coming on to be tried before a jury, and it appearing that the issues to be determined involved matters of accounting between the parties, it is thereupon ordered that the same be referred to a referee hereinafter to be named, whose duty it shall be to hear and reduce to writing the testimony, and, together with his findings, report the same to this court, as follows:

First. To ascertain the amount due the plaintiffs from the defendant Fort, as is shown by an examination and inspection of the master's report heretofore filed herein, together with interest thereon at the rate of ten per cent. per annum from the time such money was received by Fort to the time of filing this report.

Second. For the value of the rents, issues, and profits of the property purchased by Fort at sheriff's sale on the 10th day of November, 1871, which he received, or should or might have received, on account of the occupancy of the premises aforesaid, said Fort to be charged as for the occupancy thereof from the 10th day of November, 1871, to the 5th day of February, 1876.

Third. For such actual, direct damages, if any, as the plaintiffs have suffered for and on account of the issuance of the execution or
59 order of sale in the case of Henry T. Fort against plaintiffs & others for the sum of $3,342.68, which they would not have suffered had such execution or order of sale been for $3,022.22, the actual amount due from plaintiffs to the defendant Fort as found in said report of said master in chancery upon the two decrees or judgments on which the same was sold.

Fourth. For such damage or injury, if any, as was done to the said premises while the plaintiffs were excluded from the possession thereof, and during the entire period mentioned in item second, herein separating the damage so done to said premises during said period by inevitable accident from the other damage, and as to the damage so occurring

by inevitable accident during such period, the liability of the said Henry T. Fort, defendant, therefor is reserved for further consideration.

It is further ordered, that for the purpose of ascertaining the amount of the four several items of money for which the defendant Fort should account to the said plaintiffs, the referee proceed forthwith to take the testimony produced by the parties respectively thereon, and that he report separately on the three first items thereof; and as to the
60 fourth item as hereinbefore directed.

And it is further ordered that the plaintiffs produce their testimony before the referee on or before the 22nd day of June, 1877, giving to the adverse party reasonable notice of the time and place of taking the same, and that the defendant Fort thereupon produce his testimony before such referee on or before the 23rd day of June, 1877, giving to the adverse party reasonable notice of the time and place of taking such testimony, and that the plaintiffs shall forthwith thereafter produce their rebutting testimony, if any, and that the referee report such testimony, together with his findings thereon, to this court on or before the 23rd day of June, 1877.

And it is further ordered that Isaac R. Alden be, and he is hereby, appointed such referee.

DECIUS S. WADE, *Judge.*

To each and all of the said items and issues mentioned in said order as item first, second, third, and fourth, and to every part thereof, the defendant at the time duly excepted.

The defendant asked the court to submit to said referee, as one of the items and issues in said order of reference, the following, to wit:

61 "What was the balance due on the judgment and decree rendered in favor of defendant Fort and against the plaintiffs, under which the sale of the property was made, after deducting the amounts realized on the sale of the property sold to Reece and Stoner under order of sale issued on said judgment and decree?"

The court refused to submit the last-named item and issue, asked by defendant, to which action of the court in refusing to submit said item and issue the defendant Fort at the time duly excepted, and asks that this, his bill of exceptions, be signed, sealed, and made a part of the records in this cause, which is done.

June 21st, 1877.

D. S. WADE, *Judge.*

That afterwards, to wit, on the 30th day of June, 1877, defendant Fort made an application to amend his answer in words and figures as follows, to wit:

In the territorial district court, 3rd jud. district, Lewis and Clarke County, Montana Territory.

GEORGE & ELIZA ROUSH, PLAINTIFFS,
vs.
HENRY T. FORT ET AL., DEFENDANTS.

62 Be it remembered that this cause coming on to be heard in pursuance of notice, upon the application of defendant Fort to file an amended answer to the amended and supplemental complaint in this cause said amended answer, substantially incorporating therein the

amendment heretofore proposed and marked Exhibit A, and which said amended answer is hereto annexed, marked Exhibit B, and made a part of this bill of exceptions, being as follows, to wit:

EXHIBIT B.

In the district court, 3rd judicial district, Lewis & Clarke County, Montana Territory.

GEORGE ROUSH & ELIZA ROUSH, PLAINTIFFS,
vs.
HENRY T. FORT, FREDERICK REECE, AND Isaac W. Stoner, defendants.

Now comes the said defendant Henry T. Fort, by his attorneys, Woolfolk & Bullard and H. M. Porter, and, by leave of the court first had and obtained, files this, his amended answer to the amended and supplemental complaint of the plaintiff herein, and for his said
63 amended answer admits the institution by this defendant of the action for the foreclosure of the mortgage mentioned in said amended and supplemental complaint, and that a decree was rendered by said court for the foreclosure of said mortgage as alleged in said amended and supplemental complaint.

Admits that the property described in said mortgage and decree was sold by said W. L. Steele to the persons at the time and in the amounts substantially as set forth in said amended and supplemental complaint; and that the certificates of sale were issued to the respective purchasers of said property at said sale; but said defendant denies that at the time of the issuance of said order of sale, or at the time of said sale by said Steele, the term of office of said W. L. Steele, as sheriff, had expired as sheriff of Lewis and Clarke County; but defendant alleges that said order of sale was regularly issued out of the office of the clerk of said district court and under the seal of said district court to the said W. L. Steele, who then was, and at the date of said sale continued to be the sheriff of said county of Lewis & Clarke, and had full power and authority to make said sale, and that as such sheriff, the said
64 Steele sold said property and gave the purchasers thereof at said sale certificates of their respective purchases as aforesaid, and that said sale was regular & conformible to law.

Denies that when said sale was made, or at all, plaintiffs, or either of them, gave any directions to the sheriff as to the manner or order in which he, the said sheriff, should sell said property; and denies that said sheriff failed or refused to obey said or any directions of plaintiffs, or either of them, in conducting said sale; but alleges that in all respects said sale was regularly and properly conducted.

Denies that if said property, or any part thereof, had been sold by said sheriff in the parcels or order mentioned in said amended and supplemental complaint, or in any other parcels or order, it would have brought any greater sum than it did bring at said sale, or that it would have been unnecessary to have sold the whole of said property to satisfy the amount due upon said decree.

Admits that on or about the 8th day of July, 1871, the plaintiffs and this defendant entered into an agreement in writing, but denies that by the terms of said agreement, or at all, this defendant for the consideration, or upon the conditions, or for the time mentioned in said
65 amended and supplemental complaint, or for any other consider-

ation, or upon any other condition, or for any other time whatever, save and except until after the first day of October, 1871, agreed that he would not have said property sold under his said decree.

Denies that the rents turned over to this defendant by the plaintiffs under said agreement, or at all, amounted to the sum of two hundred and fifty dollars per month, or to any greater or larger sum than two hundred and four dollars per month, and denies that the aggregate amount of said rents received or collected by this defendant prior to the time of said sale was any greater or larger sum than eight hundred and fifteen dollars.

Denies that by the terms of said agreement, or at all, this defendant ever agreed to apply said rents first to the principal sum due upon said decree and afterwards to the interest thereon, but alleges that under said agreement, by the terms thereof, the amount due on said judgment and decree was to bear interest from the first day of July, 1871, until fully paid, at the rate of two and one-half per cent. per month; said rents were to be applied first to the payment of the interest
66 on said judgment and decree and afterwards to the principal sum due thereon.

Denies that said plaintiffs upon their part complied with said agreement.

Denies that this defendant in any manner, or at all, disregarded or violated said agreement or any part thereof.

Denies that this defendant caused said property to be sold without crediting plaintiff with said sum of $815.00 rents, but allege' that said sum of $815.00 was applied to the payment of the amount due upon said decree and to the payment of the taxes due upon said property, save and except three hundred and twenty-$\frac{46}{100}$ dollars of said sum, which said sum was duly credited on the said indebtedness due from said plaintiffs to this defendant, but through inadvertance and mistake was not endorsed upon said decree prior to the issuing of said order of sale.

Denies that this defendant ever caused to be given out or made the statements alleged in said amended and supplemental complaint, or ever at all attempted to or did prevent any person or persons from bidding on said property or any part thereof at said sale.

Denies that at the times mentioned in said amended and supplemental complaint, or at any other time, this defendant has received
67 the rents or enjoyed the use or occupation of said property or any part thereof, save and except as is hereinafter admitted and set forth, and denies that the aggregate value of the use and occupation of that portion of said property which has been or is in the possession, use, and enjoyment of this defendant is one thousand dollars or any other sum.

Denies that said sale was a surprise to plaintiffs or was any violation of said agreement; or that said property at said sale sold for an inadequate or inequitable price, or that defendant diverted any part of said rents in violation of said agreement.

Denies that said property at said sale sold for any greater or larger amount in excess of the amount due this defendant than the sum of one hundred and seven and-$\frac{76}{100}$ dollars.

Denies that at the date of said sale there was only due upon said decree the sum of $2,200.00, but alleges that there was then due thereon, after deducting all credits and payments to which the plaintiffs were entitled, the sum of $3,055.79.

Denies that after said sale this defendant continued in possession of or received the rents, issues, and profits of said property or any part

thereof, save and except so much of said property as was pur-
68 chased by him at said sale, as above stated.

Denies that the possession, rents, issues or profits of said property, or any part thereof, belonged to said plaintiffs.

Denies that said rents received by this defendant after his purchase of said property amounted to the sum of $3,000.00 or any greater or larger sum than $210.69.

Denies that he has damaged or destroyed any portion of said property to the amount of sixteen hundred dollars, or any other sum or amount whatever.

Denies that this defendant received after said sale and up to the day of May, A. D. 1872, from the rents or profits of the property purchased by him at said sale, the sum of six hundred dollars, or any other or greater sum than two hundred and ten dollars.

Denies that the value of the use and occupation of the remainder of said property purchased by defendant at said sale, and which was not rented by this defendant from the date of said sale to the filing of said amended and supplemental complaint was, or is, $500, or any other sum whatever.

Denies that the value of the use and occupation of the said property purchased by said Stoner and Reece from the time of said sale to the date of the filing of said amended and supplemental com-
69 plaint, was or is $10,000.00 or any other or greater sum than $2,000, as defendant verily believes.

Denies that at the date of said sale, or at the date when this defendant took possession of said lot 7 in block 40, the building upon said lot was of the value of $300.00, or of any other or greater value than nine dollars, and denies that this defendant destroyed said building.

Denies that at the time of said sale, or at the time when this defendant took possession of said lots 99 and 3, or either of them, there was a house of the value of $1,000.00 on said lots, and denies that said house was of any other or greater value than seven hundred dollars; and denies that this defendant is chargeable with the destruction of said house or any part thereof, but alleges that the said house was, on the 9th day of January, 1874, without any fault or negligence of this defendant, destroyed by fire during a general conflagration in the said town of Helena.

Denies that this defendant is liable for the rents or profits of said property purchased at said sale by said Reece and Stoner, or either of them, or any part of said property, and denies that he (this defendant) is liable in any manner whatever on account of the purchase of said property at said sale by the said Reece and Stoner, or either
70 of them, or any part of said property.

This defendant, for further answer to the complaint of the plaintiffs, alleges that, on the day of April, 1872, the original action in this cause was instituted in equity by the plaintiffs against this defendant and his codefendants, Frederick Reece and J. W. Stoner, for the purpose of setting aside the sheriff's sales of the property described in the amended and supplemental complaint herein, and embracing the same causes of action as are set forth in said amended and supplemental complaint; that said sales had been made under and by virtue of a decree of foreclosure rendered in favor of this defendant and against said plaintiffs, and that after the institution of this action, to wit, on the 30th day of November, 1873, upon the application of plaintiffs and by agreement between the attorneys for plaintiffs and defendant, an order was made therein by the said district court referring said cause to W. E.

Cullen, esq., master in chancery, to take the testimony and report his findings, together with the testimony, to the court at the next term thereof; that in pursuance of said order the said Cullen proceeded to hear the said cause and reduce the testimony given therein to writing;
71 and after the whole of the testimony offered for plaintiffs and defendants had been taken, and the argument of their respective counsel, the said Cullen made his report of said testimony and his findings thereon to the court, which said report and findings are hereunto annexed, marked Exhibit A, and made part of this answer. That upon said report the district court, upon motion of said defendants' attorneys, made the following order, to wit:

Order.

In the district court, 3rd judicial district, Lewis and Clarke County, Montana Territory.

ELIZA ROUSH ET AL.
vs.
HENRY T. FORT ET AL.

Be it remembered that plaintiffs' motion to set aside the master's report herein coming on to be heard, and at the same time said defendant's motion for a confirmation of the sale also coming on to be heard, and it appearing to the satisfaction of the court that the plaintiffs have wholly failed to make out their case, and that the facts set up in their amended complaint herein are untrue in every material respect; it is therefore ordered that said plaintiffs' motion be overruled, and
72 said defendant's motion sustained; and that said sale be affirmed, and defendants have the nett issues and profits of said property frome the date of such sale.

D. S. WADE,
Judge 3rd Judicial District.

Defendant further states that plaintiffs appealed from said order to the supreme court of this Territory, and upon the hearing of said appeal the said order was affirmed as to the property purchased by said Reece and Stoner, and reversed as to the property purchased by this defendant.

Defendant further states that all the material issues now pending on the amended complaint herein were pending also at the time of the trial aforesaid before W. E. Cullen, esq., save and except the question as to the rents and profits of the property purchased by this defendant since the date of such purchase, and that all said issues were settled and adjudicated in said trial before said Cullen; and defendant avers that all the causes of action embraced in the amended and supplemental complaint herein have been already settled and adjudicated as aforesaid (with the exception already stated) and cannot be retried in this action.

Defendant further states that he is not liable to the plaintiffs
73 for the rents, issues, and profits of the property purchased as aforesaid by said Reece and Stoner, or in any other manner, on account of the sale of said property so purchased by them, and which said purchase was affirmed as aforesaid, but avers that he is only answerable for the rents, issues, and profits of the property purchased by him since the date thereof.

Defendant further states that the following property was purchased by him at said sale by the sheriff, to wit: lots No. 99 & 3, in block 20,

and lots 7, 16 and 17, in block No. 40, in said town of Helena; that there were no improvements upon any of said lots, except a portion of a small frame house, of the value of about nine dollars, situated upon lot seven, the remaining portion of said house being upon an adjoining lot owned by the said Frederick Reece, and also a frame building, of the value of about seven hundred dollars, situated upon said lots 99 and 3, in block 20; that said portion of said frame house on lot seven, in block 40, had no usable value whatever, and the frame building on said lots 99 and 3 were destroyed by fire during a general conflagation which de-
74 stroyed a large portion of the town of Helena, on the 9th day of January, 1874; that since the destruction of said building this defendant has received no rents or profits from any portion of the property purchased at said sheriff's sale; that all the rents received by defendant from said property, from the date of said purchase at sheriff's sale until the destruction of said building by fire, did not exceed two hundred and ten dollars; that defendant has expended nearly that amount upon said property since the date of said purchase at sheriff's sale in the payment of taxes and repairs thereon, to wit, about the sum one hundred and twenty-five dollars.

Defendant, for further answer, and as a cross complaint to the complaint of the plaintiffs, states that on 10th day of November, A. D. 1871, the date of the sheriff's sale aforesaid, after allowing plaintiffs credit for all such rents collected and payments made, the judgment in favor of this defendant and against said plaintiffs amounted to $3,055\frac{14}{100}$ besides costs, which were $236.45, all of which will more fully appear by the report of said Wm. E. Cullen hereto annexed and to which reference is hereby made; that the property purchased by said Reece and
75 Stoner sold for $1,800.00; that after crediting the said judgment of defendant with the amount of said sales to Reece and Stoner, there was left a balance due him upon said judgment of $1,255.79 besides costs as aforesaid, and making a total with said costs of $1,499.24, and that said amount and interest thereon at the rate of two and one-half per cent. per month from the said 10th day of November, 1871, is still due and unpaid to this defendant from the plaintiffs; that since said sheriff's sale has been set aside said defendant has acquired no title thereunder to any of said property purchased by him at sheriff's sale as aforesaid, and therefore prays the honorable court that the judgments or decrees aforesaid be revived for the aforesaid balance of $1,492.24 due him thereon at the date of the said sale, after crediting the same with the amounts of the sales to Reece and Stoner as aforesaid, and that defendant recover interest on said balance at the rate of $2\frac{1}{2}$ per cent. per month from the date of said sale, being the amount agreed upon between plaintiffs and the defendant; that this de-
76 fendant is still the owner and holder of said balance due on said decrees mentioned in plaintiffs' amended and supplemental complaint and set forth in the report of W. E. Cullen, esq., hereunto annexed, and that no portion of said balance on said decrees or judgments has been paid, but that the same with interest thereon as aforesaid is still due and unpaid from plaintiffs to this defendant.

Defendant further states that plaintiffs are wholly insolvent and irresponsible, and that if defendant is compelled to account to plaintiffs for the rents and profits of the property purchased by him, unless the amount found due upon such accounting shall be credited upon the sums due from the plaintiffs to this defendant as aforesaid, this defendant will be wholly unable to collect the said amount, or any part thereof.

Wherefore defendant prays the honorable court that whatever sum,

if any, may be found due the plaintiffs from said defendant on account of the property or the rents thereof, purchased as aforesaid by this defendant, may be credited upon the said balance due as aforesaid to this defendant from the plaintiffs; and that defendant have an order
77 of sale against the aforesaid property remaining unsold, to pay and satisfy the balance, if any, due on said judgments or decrees, after entering said credits, together with interest thereon from the 10th day of November, A. D. 1871, and that defendant recover his costs in this behalf expended.

WOOLFOLK & BULLARD AND H. M. PORTER,
Attorneys for Defendant Fort.

TERRITORY OF MONTANA,
County of Lewis & Clarke:

H. M. Porter, being first duly sworn, deposes and says that he is one of the attorneys of the defendant Henry T. Fort; that this verification to this answer is made by affiant for the reason that the said Fort is now residing in the State of Missouri, and therefore unable to verify the same himself. That the facts stated in said answer are true, to the best knowledge, information, and belief of this affiant.

H. M. PORTER.

Subscribed and sworn to before me this 28th day of June, A. D. 1877.

A. H. BEATTIE, *Clerk.*

EXHIBIT A.

78 In the district court of the third judicial district.

TERRITORY OF MONTANA,
County of Lewis and Clarke:

GEORGE ROUSH ET AL. }
vs.
HENRY T. FORT ET AL. }

This cause having been referred to the undersigned master in chancery of said court by an order duly made and entered therein on the day of November, A. D. 1872, have respectfully to report that by agreement of parties the said cause was brought on to be heard before me, at my office in Helena, M. T., on the 14th day of December, A. D. 1873, the parties to said action and their respective attorneys being present. The hearing of said cause not being completed on the said 14th day of December, the same was continued from day to day, and was completed on the 17th day of the same month. The testimony given by the witnesses upon such hearing was reduced to writing by myself and is comprised in the 72 pages of testimony herewith returned as part of this report. After duly considering said testimony and hearing the argument of counsel thereon, I find the following facts to be the facts in said cause:

79 1st. That prior to the commencement of the sale complained of in plaintiff's bill, the plaintiff, George Roush, gave to the officer making such sale, directions as to the manner and order of making said sale, which were faithfully observed by the officer; but that during the progress of the sale the said plaintiff requested the said sheriff to split

up or divide a certain lot then about to be sold, and reserve from sale the rear portion of said lot, with which request the sheriff declined to comply. That upon such sale the property brought reasonably fair prices or figures.

3. That the defendants named in plaintiff's bill were the purchasers thereof.

4. That prior to said sale, and on the 8th day of July, 1871, the plaintiff and the defendant, Henry T. Fort, entered into an agreement in writing, whereby the said defendant agreed not to sell said property until after the 1st day of October then next ensuing, in consideration whereof the said plaintiff agreed to, and did turn over to said defendant the rents, issues, and profits of said property, and agreed to allow said defendant interest upon two certain judgments then held by him at the rate of two and one-half per cent. per month from the 1st day of July, 1871. That by the terms of said agreement the rents, issues, and
80 profits of said property, after being collected by said defendant, were at the end of each and every month to be endorsed as a credit upon the aforesaid indebtedness as a payment of the interest and principal thereof, or other indebtedness the said defendant may hold against the said plaintiffs or their property.

5. That in pursuance of said agreement the said defendant forbore to sell the said property until after the time agreed upon, to wit, until the 10th day of November, 1871, at which time the said sheriff's sale took place.

6. That by virtue of said agreement the said defendant H. T. Fort collected the sum of $815.00.

7. That he did not at the end of each and every month endorse upon the said indebtedness the amount collected by him, but that he applied a portion thereof to the payment of the interest accruing under the terms of said agreement; a portion thereof to the redemption of said property from a tax sale at which he had purchased the same, and a portion to the payment of the taxes on said property for the year 1871. The defendant, Fort, claimed two other items of credit as against the $815.00 collected by him, being a commission of ten per cent.
81 upon the amounts collected for collecting the same, and the amount of a certain note against the plaintiff, George Roush, purchased by said defendant of one W. L. Steele, neither of which seem to your referee to be within the purview of the agreement mentioned in the 4th finding herein.

8. That said sale was made by virtue of two certain orders of sale, issued upon a certain decree of the court in the case of Henry T. Fort vs. George and Eliza Roush, made and entered therein on the 16th day of March, A. D. 1871, for the sum of two thousand eight hundred and ninety-five and $\frac{20}{100}$ dollars and costs; and the other in favor of L. M. Hartwell et al. and against the said George & Eliza Roush, made and entered on the first day of November, 1870, for the sum of two hundred and thirty-eight dollars and costs, both of which said judgments or decrees were the property of Henry T. Fort.

9. That at the time of said sale, there was due the said Henry T. Fort upon the said judgment the sum of $30.55, and that he caused the said property to be advertised and sold to satisfy a sum greater than was then due him thereon, to wit, for the full sum for which said judgments were entered, with interest thereon from the respective dates of
82 their rendition. In illustration of this the following account is submitted:

if any, may be found due the plaintiffs from said defendant on account of the property or the rents thereof, purchased as aforesaid by this defendant, may be credited upon the said balance due as aforesaid to this defendant from the plaintiffs; and that defendant have an order
77 of sale against the aforesaid property remaining unsold, to pay and satisfy the balance, if any, due on said judgments or decrees, after entering said credits, together with interest thereon from the 10th day of November, A. D. 1871, and that defendant recover his costs in this behalf expended.

WOOLFOLK & BULLARD AND H. M. PORTER,
Attorneys for Defendant Fort.

TERRITORY OF MONTANA,
County of Lewis & Clarke:

H. M. Porter, being first duly sworn, deposes and says that he is one of the attorneys of the defendant Henry T. Fort; that this verification to this answer is made by affiant for the reason that the said Fort is now residing in the State of Missouri, and therefore unable to verify the same himself. That the facts stated in said answer are true, to the best knowledge, information, and belief of this affiant.

H. M. PORTER.

Subscribed and sworn to before me this 28th day of June, A. D. 1877.

A. H. BEATTIE, *Clerk.*

EXHIBIT A.

78 In the district court of the third judicial district.

TERRITORY OF MONTANA,
County of Lewis and Clarke:

GEORGE ROUSH ET AL. }
vs. }
HENRY T. FORT ET AL. }

This cause having been referred to the undersigned master in chancery of said court by an order duly made and entered therein on the day of November, A. D. 1872, have respectfully to report that by agreement of parties the said cause was brought on to be heard before me, at my office in Helena, M. T., on the 14th day of December, A. D. 1873, the parties to said action and their respective attorneys being present. The hearing of said cause not being completed on the said 14th day of December, the same was continued from day to day, and was completed on the 17th day of the same month. The testimony given by the witnesses upon such hearing was reduced to writing by myself and is comprised in the 72 pages of testimony herewith returned as part of this report. After duly considering said testimony and hearing the argument of counsel thereon, I find the following facts to be the facts in said cause:

79 1st. That prior to the commencement of the sale complained of in plaintiff's bill, the plaintiff, George Roush, gave to the officer making such sale, directions as to the manner and order of making said sale, which were faithfully observed by the officer; but that during the progress of the sale the said plaintiff requested the said sheriff to split

up or divide a certain lot then about to be sold, and reserve from sale the rear portion of said lot, with which request the sheriff declined to comply. That upon such sale the property brought reasonably fair prices or figures.

3. That the defendants named in plaintiff's bill were the purchasers thereof.

4. That prior to said sale, and on the 8th day of July, 1871, the plaintiff and the defendant, Henry T. Fort, entered into an agreement in writing, whereby the said defendant agreed not to sell said property until after the 1st day of October then next ensuing, in consideration whereof the said plaintiff agreed to, and did turn over to said defendant the rents, issues, and profits of said property, and agreed to allow said defendant interest upon two certain judgments then held by him at the rate of two and one-half per cent. per month from the 1st day of July, 1871. That by the terms of said agreement the rents, issues, and
80 profits of said property, after being collected by said defendant, were at the end of each and every month to be endorsed as a credit upon the aforesaid indebtedness as a payment of the interest and principal thereof, or other indebtedness the said defendant may hold against the said plaintiffs or their property.

5. That in pursuance of said agreement the said defendant forbore to sell the said property until after the time agreed upon, to wit, until the 10th day of November, 1871, at which time the said sheriff's sale took place.

6. That by virtue of said agreement the said defendant H. T. Fort collected the sum of $815.00.

7. That he did not at the end of each and every month endorse upon the said indebtedness the amount collected by him, but that he applied a portion thereof to the payment of the interest accruing under the terms of said agreement; a portion thereof to the redemption of said property from a tax sale at which he had purchased the same, and a portion to the payment of the taxes on said property for the year 1871. The defendant, Fort, claimed two other items of credit as against the $815.00 collected by him, being a commission of ten per cent.
81 upon the amounts collected for collecting the same, and the amount of a certain note against the plaintiff, George Roush, purchased by said defendant of one W. L. Steele, neither of which seem to your referee to be within the purview of the agreement mentioned in the 4th finding herein.

8. That said sale was made by virtue of two certain orders of sale, issued upon a certain decree of the court in the case of Henry T. Fort vs. George and Eliza Roush, made and entered therein on the 16th day of March, A. D. 1871, for the sum of two thousand eight hundred and ninety-five and $\frac{90}{100}$ dollars and costs; and the other in favor of L. M. Hartwell et al. and against the said George & Eliza Roush, made and entered on the first day of November, 1870, for the sum of two hundred and thirty-eight dollars and costs, both of which said judgments or decrees were the property of Henry T. Fort.

9. That at the time of said sale, there was due the said Henry T. Fort upon the said judgment the sum of $30.55, and that he caused the said property to be advertised and sold to satisfy a sum greater than was then due him thereon, to wit, for the full sum for which said judgments were entered, with interest thereon from the respective dates of
82 their rendition. In illustration of this the following account is submitted:

gation has been restricted, his sole aim has been to reach just conclusions and accurately to determine the rights of the parties.

87 The testimony upon all the propositions submitted upon which any evidence was taken is conflicting and contradictory. But the following special findings are made from what the undersigned conceives to be the weight or preponderance of the testimony:

First. That the rental value per month of lots 3 and 99, in block 20, together with improvements situated upon the same, from the 10th day of November, 1871, to the 1st day of January, 1873, was $75.00.

Second. That the rental value of the said premises per month from the 1st day of January, 1873, to the 9th day of January, 1874, was $50.00.

Third. That the value of the improvements upon said lots, November 10, 1871, was $1,150.00.

Fourth. That said improvements were destroyed by fire on the 9th day of January, 1874.

Fifth. That the value of the said premises, with improvements situated on the same, on the 10th day of November, 1871, was not ascertained.

Sixth. That the value of the premises on the 5th day of February, 1876, was ; and their value at the present time is .

Seventh. That the value of the building on lot 7, in block 40,

88 taken in connection with the ownership of the lot, was, on the 10th day of November, 1871, $50.00.

Eighth. That the rental value of the said lot, with building that was upon it, on the said 10th day of November, 1871, from that date to the present time, was $6.00 per month.

Ninth. That the rental value of lots 16 and 17, in block 40, from the 10th day of November, 1871, to the present time, was $10.00 per month.

Tenth. That the plaintiffs were about to place improvements upon said lots 16 and 17 at the time of sale for the purpose of renting the same.

Eleventh. That the value of said lots 16 and 17, on the 10th day of November, 1871, was $600.00.

Twelfth. That the value of said lots 16 & 17, in January, 1876, was $400,00, and their value at the present time is $400.00.

Having no leisure to review or comment on the evidence in this report, your referee submits, in conclusion, the following condensed summary of the amounts found due to the said plaintiffs, George and Eliza Roush, from the said defendant, Henry T. Fort, viz:

89 To balance due to Geo. & Eliza Roush from H. T. Fort, as per master's report, $107.76; int. on same to present time, June 30, '77, $60.75 ..... 168 51

To value of use & occupation of lots 3 and 99, in block 20, from Nov. 10, '71, to Nov. 10, '72, @ $75.00 ..... 900 00

Do. from Nov. 10, '72, to Nov. 10, '73, @ $60.00 ..... 720 00

To value of use & occupation of same from Nov. 10, '73, to Jan'y 9, 1874, @ $50.00 ..... 100 00

To value of use & occupation of said lots from Jan'y 9, '74, to Feb'y 5, '76, @ $25 per month 621 58

To value of building on lot 7, block 40, torn down by Allen. 50 00

To use & occupation of lot 7, block 40, from Nov. 10, '71, to Feb'y 5, 1876, 4 yrs. 2 mos. 26 days, @ $6 ..... 305 20

To value of use & occupation of lots 16 & 17, in block 40, from Nov. 10, '71, to Feb'y 5, '76, @ $10 per mo	528 58
	$3,393 87
By amount of cost of repairs to building on lots 3 and 99, paid by Fort	58 20
Showing balance due Roush et al. of	$3,335 67

In regard to the 3d & 4th items in the order of reference no testimony was offered, and upon which the undersigned will not venture to report.

All of which is respectfully submitted.

90 June 30, 1877.

ISAAC R. ALDEN,
Referee.

Referee's fees:

9 days' attendance, @ $8.00	72 00
Taking testimony, 200 folios, @ 20 c	40 00
Making report, &c	5 00
	$117 00

EXHIBIT A.

Testimony taken before I. R. Alden, referee.

GEO. & ELIZA ROUSH
vs.
HENRY T. FORT ET AL.

PLAINTIFFS' TESTIMONY.

GEORGE ROUSH, the plaintiff, being first duly sworn, testified as follows, to wit:

I know the property purchased by Fort at sheriff's sale on the 10th day of November, 1871, lots 99 and 3, in block 20, in Helena. Fort had possession of the property from the date of the sale. I have never received the possession back from Fort. These lots are at the upper end of Main street, in Helena, M. T., opposite the International Hotel. Lot 3 fronting on Main street, & lot 99 in the rear of and adjoining it. There were on lot No. 3, on the 10th day of November, 1871, one frame building 50 or 55 feet long; the ceiling 11 ft. & 6 in. high, & 12½
91 feet wide; the room was lined with muslin & papered; there was a petition through it, dividing it into 2 apartments; there was no other buildings on the said lots. Lot 3 was 12½ feet wide & 131 feet long, & lot 99 45½ feet long & 9 ft. wide, and lay adjoining and across the end of lot 3. Parkinson theatre adjoined lot 3 on the south side; on the north side by building occupied by Wm. Wentworth as a saloon. The block of buildings, of which lot 3 formed a part, extended from Bridge to Edward street. From Nov. 10, 1871, to 10th Nov., 1872, the monthly value of the property in rent was $75 per month; the value of the occupation of the property from Nov. 10, '72, to Nov. 10, '73, was $75 per month. From Nov. 10, '73, to 9th day of January, 1874, the

property was worth $60.00 per month. The ordinary expense for repairs of the buildings and caring for the same from Nov. 10, 1871, to January 9, 1874, was about $150.00. The value of the use and occupation of said premises from January 9, 1874, to the 6th day of Feb'y, 1876, without the building, it would be difficult to say with certainty.

Question. What would have been the value of the use and occupation of those lots from Jan'y 9, 1874, to Feb'y 6th, 1876, as they were?

92 Answer. They were worth $25.00 per month to me, because I would have put a building on them.

(Objected to.)

Ques. What would they have been worth to anybody else who would have put a building upon them?

Answer. About the same.

(Objected to.)

Ques. What would have been the value of the rents, issues, and profits of said 2 lots for the said two years & 26 days next after Jan'y 9, 1874, provided the buildings had remained thereon as they were from Nov. 10, 1871, to Jan'y 9, 1874?

(Objected to.)

Answer. For the last 2 years about $50.00 per month, and at the rate of $50.00 per month for the 27 days. The building burned down during the general conflagration of January 9, 1874, while in Fort's possession, and have not since been rebuilt. The lots could not be rented for anything in the condition in which they have been since the fire.

Ques. If these lots had been occupied for any purpose since Jan'y 9, 1874, down to Feb'y 6, 1876, what would have been a reasonable compensation for their use per month during that time?

(Objected to by defendant.)

93 Answer. It would not have been less than $25.00 per month.

Ques. What was the value of the building which was on that lot on the 10th day of November, 1871, together with outbuildings thereon?

(Objected to by defendant.)

Answer. $1,150.00. It was worth within $75.00 of that amount up to Jan'y 9, 1874; and this $75.00 deterioration was for lack of necessary repairs to the building. I have never received back from Fort the possession of the property.

Ques. What could you have done with this property if it had been in your possession during this time?

(Objected to by defendant.)

Answer. I could have put a building on lot No. 99 and rented it, and put an upper story upon the building on lot No. 3, and rented it for a doctor's office, which I could have rented for $25.00 per month. I was receiving $75.00 per month rent for this property at the time of the sale, Nov. 10, 1871.

Ques. To any person who desired this property to use, how much would it have been worth from Feb'y 5, 1876, until now?

(Objected to by defendant.)

94 Answer. I cannot answer. Fort was here 5 or 6 months after Nov. 10, 1871, and the balance of the time, I think, he was in the State of Missouri. I know lot 7, in block 40, in Helena. Henry T. Fort, the defendant, had possession of it since Nov. 10, 1871, the day of the sale. I also know lots 16 & 17, in block 40, in Helena. These lots were purchased by Fort Nov. 10, 1871. There was a Chinese washhouse on lot 7, adjoining the Dana Hotel. The house was torn down

by Mr. Allen, to make an alley leading to & from the stable and corral. The house was 12 by 30 feet in size, & divided into 2 rooms. The value of this house on the 10th day of Nov., 1871, was about $300.00. The monthly value of the rent of this house from Nov. 10, 1871, to Feb'y 5, 1876, was $12.00, the amount paid by the tenant; it was worth the same amount down to the time the house was destroyed. There were no improvements on lots 16 & 17, except a few posts. The use and occupation of said lots 16 & 17 was worth $10 per month from the 10th day of Nov., 1871, to the present time. I was prevented from doing anything with the lots. H. T. Fort was in possession. The lots were located in a first-class location. I was ready and it was my intention to erect a building thereon fronting on Fifth avenue, to rent, on lot No. 16,
95 and a small office building fronting on Court-house Square on said lot 17.

(Defendant objects to all the foregoing testimony in referenceto lots 16 and 17.)

I told Doct. Steele, the sheriff, to sell lot No 13, fronting on Fifth avenue, separately from the other lots. This lot was worth from $400 to $500. There was a stable on lot No. 13. This lot is situated in the rear of and adjoining lots 10 and 11 on Rodney street. The sheriff sold the two lots on Rodney street, 10 and 11, and lot 13 together. There was a blacksmith-shop on lot No. 10, and a wagon shop on lot No. 11. The barn on lot No. 13 was torn down.

(Defendant objects to all the foregoing testimony in reference to lots 10 and 11 and 13.)

I have been unable to get the possession or control of the property in question since the sale, Nov. 10, 1871.

Cross-examined:

Ques. You have stated the decrease in the value of the rent of the property on Main street was caused by neglect and want of repairs. State whether there had not been a general decline in rents of property in that vicinity for a year or more before this property was burned.

96 Answer. There was no general decline.

Ques. State whether that locality continued to be the best business part of the street up to the time of the fire, Jan'y 9, 1874?

Answer. It was at a stand-still in that portion of the town.

Ques. Do you not know that rents had declined very much in that locality during the two years next preceding the said fire on this and other property?

Answer. The three best business houses paid about the same rent.

Ques. Who occupied these three houses referred to?

Ans. Dan Floweree and the International Hotel proprietors.

Ques. State whether the rents of this and other property on the same side of the street with it, and in that locality, declined very much in the 2 years preceding the fire.

Answer. I am not sure, but believe not.

Ques. You stated you would have built a house on lot No. 99; does it front on any street?

Answer. No, sir.

Ques. Do you know where the line is between lots 6 and 7, in block 40?

97 Answer. I do.

Ques. What part of the house torn down by Allen stood on lot 6, and what part on lot 7?

Answer. 4 feet on lot 6, and eight feet on lot 7.

Ques. How do you arrive at the value of the said house as stated in your direct examination?

Answer. From the material and labor expended upon it.

Ques. What was the cash value of ⅔ of that house at the time it was torn down?

Answer. I cannot say.

Ques. Is the estimate you have placed on it made as though it stood altogether on and belonged to and as a part of your lot?

Answer. No, sir.

Ques. Do you mean to say that that part of the house that stood on lot 7 was worth $300.00?

Answer. That part was not worth $300.00. I estimate the whole house as being worth that sum.

Ques. Do you not know that about one half of the houses on Rodney street near this house have been vacant for want of tenants since the date of the sale of this property up to the present time?

98 Answer. There have been a few vacant houses in that vicinity during the past year; but not one-half of the whole number.

Ques. State whether any vacant lots adjoining to or in the neighborhood of lots 99 and 3 in block 20, have been rented or used for any purpose since the fire.

Answer. I do not know; there are two vacant lots on each side of lots 99 and 3, block 20, which are not used or occupied for any purpose at this time for the reason that parties owning them are unable to build.

Ques. State whether in your judgment, either lots 99 and 3 in block 20, or 16 and 17 in block 40, could have been rented for anything without any improvement on them.

Answer. They could have been rented for building purposes. They could have been leased for such purposes for a term of 4 or 5 years.

Ques. What do you mean by saying you were ready to build on lots 16 and 17?

Ans. I had 4 horses and wagon to haul my own material, and am myself a mechanic. I had money and material of my own to build with. I had lumber partly enough. I had engaged lumber of Mr. Holter, to be paid for in hauling. I had at my stable about 500 feet of finishing

99 lumber. I had about 500 or 600 feet of lumber—inch boards. I had 4 setts of window sash at my house, 6 locks, hinges for 3 doors, 4 sills, 4 x 6 inches, and about 9 rafters, and about 2 kegs of paint. This is all the material I had. I was going to build a concrete. I had $150 in money on hand.

Re-direct:

The lumber I had at the stable was taken away. I lost it.

M. R. DELAY, sworn.

I am a carpenter by trade. I have resided in Helena since July, 1866. I knew the building claimed by Mr. Roush on lot 3 opposite the International Hotel. I knew the price of labor and material about Nov., 1871. Labor was worth at that time from five to seven dollars per day. Lumber ranged in price from $22.50 to $60 per M. The value of the said building, as near as I can estimate the cost to build it at that time, was about $1,175.00. I make this amount from my estimate of the value of the material and the labor. I have made the estimate of the cost of the building on lot 7, on Rodney street, as described by the

plaintiff Roush. Such a building—according to his statement, such a building would cost from $289 to $300. I made the estimate for a building 14 x 29, side walls to be 8 feet in length and shingle roof,
109 3 doors & 3 windows, and high square front, flooring and such framing timbers as would be required for such a building.

(Defendant objected to the foregoing evidence relating to the building on lot 3, block 20, & 7 in block 40.)

Cross-examination:

Question. What would be the market value of ⅔ of the said building on lot 7 in block 40, the said building being divided lengthwise, at the time or times referred to in your evidence as to the value of said building?

(Plaintiffs object.)

Answer. I cannot say.

M. R. DELAY.

WILLIAM WENTWORTH, sworn.

I resided and was doing business in Helena, in the years 1869-'70-'71-'72. I done business near the upper end of Main street, in a building known as the Ming House, opposite the old International hotel and adjoining the Roush property. I knew the Roush building. The rental value of said Roush building in 1871 & 1872, would be $75 to $100 per month. That would be a reasonable rent. The value 1873, was less; rents had declined. I think that in 1873, $40 or $50, would have been a fair rental for that building.

101 Cross-examined:

Ques. What time did you leave the Ming House?

Answer. About May, 1873.

Ques. What rent per month did you pay for the Ming House for the last year you kept it?

Answer. For a portion of the time $100.00 per month, and the balance of the time $50. I had the building leased by the year except for the last year that I occupied it. The first year, from June, 1869, to June, 1870, I paid $150 per month rental. From June, 1870, to June, 1871, I paid $100 per month. From June, 1871, to June, 1872, I paid $100. Business since 1871 & '2, has been working down the street.

Ques. Was the Ming House occupied from the time you left it down to the time of the fire?

(Plaintiffs objected.)

Answer. Do not think it was. I know it was not, except perhaps for a month or two by Healy.

Ques. Who occupied the Roush House from Nov. 10, 1871, until its destruction by fire in 1874?

(Plaintiffs object.)

Answer. Wolf, a barber; next, McEvily, and then Dusold, and then Carr.

102 Ques. State whether the Roush House or any of the buildings near it on that side of the street had been occupied for a few months previous to the fire in 1874.

(Pl'ffs object.)

Answer. Do not think the Roush House was occupied for one or two months previous to the fire, but will not be positive. Do not know of any other building near the Roush House being unoccupied at that time.

Ques. What, in your judgment, could the Roush House have been rented for at the time you left the Ming House?
(Pl'ffs object.)
Answer. I cannot say.
Ques. Was it desirable as a business stand?
(Pl'ffs object.)
Answer. I do not think it was at that time.
Ques. Was it then a good location for business?
(Pl'ffs object.)
Answer. Not as good as some other location on the street. It was a frame house. It leaked, and so did mine. The building stood on posts and was shaky; so were all the buildings along there.

W. F. WENTWORTH.

N. H. WEBSTER sworn, and testified as follows:

I was doing business in 1871, '2, & '3, in Helena, in what was
103 known as the Travis building, on Main street. I continued there until the 9th of January, 1874, the time of the fire. I knew the Roush building. Do not know particularly what rents were at that time except the rent of the buildin goccupied by myself and Mr. Wing. My place was the 3rd door north of the Roush building. The room I occupied was ten feet front by 40 deep. From Nov., 1871, to Nov., 1872, the rent of the Roush building would be about $50 per month. For a saloon it would probably have rented for more. From Nov., 1872, to Nov., 1873, it would have rented for about $50.00.
(Def't objects to all the foregoing testimony.)

Cross-examined:

Ques. State whether the business was leaving that locality just previous to the fire.
Answer. There were 3 houses vacant, and 8 houses occupied in the vicinity of the Roush building for 2 or 3 months previous to and at the time of the fire in January, 1874.
Ques. State whether, on the eleven houses last referred to, the value of the rents had been decreasing for a year previous to the fire.

Answer. Yes, I think about one-third. The said houses were
104 all burned by the fire in January, 1874. Buildings have been erected upon two of the lots referred to, since the fire. I mean when I say that rents decreased ⅓, I mean that my rent had decreased that amount.

H. N. WEBSTER.

JAMES MCEVILY sworn, testified as follows, to wit:

I was in business in Helena in 1871 & '2; I occupied the Roush building, at the upper end of Main street. I took possession of said building in the fall of 1871, and staid there nearly one year. I rented of Mr. Roush when I first went in. I paid the rent to Mr. Roush at first, and for several months I paid it to Henry T. Fort. I paid $75.00 per month rental for the time I was there. I have been in busines here since that time. I am acquainted with what rents have been since that time. From the time I took that building to the time of the fire, rents did not decline materially. They did not with me nor with anybody in the neighborhood. I was renting a building two doors north of the Roush building after I left the same. The value of the rental of the Roush building from the time I left it until the time of the
105 fire, was about the same as when I occupied it. I was acquainted

with the value of property in the vicinity of the Roush building, in Nov., 1871. In my judgment the value at that time of the Roush property was $2,500.00. I cannot say what the value of the lot was after the fire. The value of the lots in January, 1876, and now is $300 or $400.00.

(Defendant objects to all that portion of the evidence as to the value of the lots.)

Cross-examination:

I left the Roush house in the spring of 1872. I afterwards occupied the Ming house 6 or 8 months. I went from there to the smelting works. I know nothing more about the value of property in the vicinity of the Roush building after I went to the smelting works than I knew when I left. I very seldom came to town.

Redirect:

After I left the smelting works I returned to town in the spring of 1873, and located on Wood street, and have been there ever since, and in the neighborhood.

JAMES McEVILY.

JOHN KINNA sworn:

106 I reside in Helena, M. T. Have resided here since A. D. 1865. I am the owner of one lot on 5th avenue, in Helena, 50 by 100 feet. The lot is located between Ewing & Rodney streets, on the south side. Mr. Roush's property joins mine on the west. The claim of Mr. Roush in dispute with Mr. Fort—the ground claimed by Mr. Roush was worth, on the 10th day of Nov., 1871, in my judgment, was $600.00. In my opinion the ground was worth, in January, 1876, about $400, and that amount at the present time. In my opinion the Roush ground would be worth a rental of $10 per month from Nov., 1871, to the present time, to any one who might desire to put a house upon it. That is, I mean to say, that the use of the land would be worth that much. I know lot No. 13, lying east of the premises occupied by A. J. Davidson. In my judgment said lot No. 13 was worth, in Nov., 1871, $500.00.

(Defendant objected to all the foregoing evidence in regard to said lots and the rental value of the same.)

Cross-examination:

Ques. State whether the lots 16 & 17, lying west of your lot, in your opinion, could have been rented for any thing since the 10th of
107 November, 1871, in their present condition, being unimproved.

Answer. I do think they could.

Ques. State whether you were present at the sheriff's sale of lots 16 & 17, in block 40, on the 10th day of November, 1871.

(Pl'ffs object.)

Answer. I was. I did not bid on the lots.

Redirect:

Ques. State if in your opinion the lots 16 & 17 did not have a rental value without improvements if a lease was given for a term of years. If so, state how much.

(Def't objects.)

Answer. I should think they had. About $10 per month.

JOHN KINNA.

Defendant's testimony.

ROBERT CARR, being duly sworn, testified as follows:

I reside in Helena, M. T. Have resided here about seven years. My age is 38 years. I know the Roush property opposite the International Hotel, on Main street. Have known it since Feb'y, 1873. I occupied the property from 4th Feb'y, 1873, to about the 25th of September, 1873.

I carried on the boot and shoe business. I rented of Geo.
108 W. Fox, agent for Fort.

Ques. What rent did you pay for said property?

(Plaintiff objected to the question as irrelevant and incompetent.)

Answer. For the first 4 months I paid $20.00 per month. For the balance of the time I occupied the property I paid $12.00 per month.

Ques. What was a fair and reasonable rental value of the property during the time you occupied it?

(Plaintiffs objected on the ground that there is no sufficient foundation.)

Answer. I should judge about $10 or $11.00 per month.

Ques. State whether it was a good business stand at that time.

Answer. No; it was not a very good business stand then.

Ques. From what do you arrive at the conclusion that the property was worth what you state?

Answer. My customers would come up there; although as a business place it was not very good.

Ques. State whether, from your knowledge of the property and of its location, in your opinion, it could have been rented for any more
109 during the time you had it than you paid.

(Objected to by plaintiffs as incompetent.)

Answer. Do not think it could have been rented for more. The property remained unoccupied from the time I left it until the fire in Jan'y, 1874.

Ques. State whether the business of the town had generally moved down the street at the time you took possession of the Roush property.

(Objected to by plaintiff as leading.)

Answer. It had.

Ques. State whether, after you went into the Roush building, and up to the time you left it, it became less desirable as a location for business, or did it become more so?

(Objected to by plaintiffs as leading and incompetent.)

Answer. It became less desirable as a business location. There was a side-walk on that side of the street, extending as far as this property. There was a new roof put on the building over the old one. The cost of the roof and changing the window was about $40.00.

Ques. State what, in your judgment, would have been a fair
110 rent for the property for the six months previous to the time you took possession of it.

(Objected to by plaintiffs.)

Answer. About $20 per month.

Ques. State what, in your judgment, would have been a fair rent for the property from the time you left it until the 9th day of Jan'y, 1874?

(Objected to as incompetent.)

Answer. Do not think it could have been rented for business purposes.

Cross-examination:

I am by occupation a shoemaker. My place of business is on Main

street, Helena, M. T. Have carried on business on my own account about 9 months. Geo. W. Fox, of whom I rented the Roush building, was a banker, and was not engaged in renting buildings any farther that I know of. The fire of 1874 was, in some measure, the cause of business going down the street. The principal livery stable, hotel, hardware store, express office & other business establishments of the town were in the vicinity of the Roush building until the fire of 1874. I could have rented a better building lower down the street for less money than I was paying for the Roush building. The Johnson & Deu-
111 treille building was 60 per cent. better than the one occupied by me. Do not know what the rental value of the Johnson building was at the time, nor of the Webster building. My sales were about $300 per month. I employed one man.

Ques. What point was there in town at the time where, within a radius of ten rods, more business was carried on than within the same extent where you transacted business in the Roush building?

(Defendant objects.)

Answer. I should think about Parchen & Paynter's; Parchen & Paynter were conducting their business within 8 or 10 doors of the Roush building up to the time of the fire.

Ques. Were there but 3 buildings between your place of business and Parchen & Paynter's drug store?

Answer. I think there were 3 or 4 buildings; the Roush building was a part of a solid block of buildings extending from Bridge street to Edwards street. My business was a small one.

Ques. Did you not rent the Roush building because it was the best you could do?

Answer. No, sir; I conducted business one month on my own account after I moved out of the Roush building.

112 Ques. What business was removed down town from Nov. 10, 1871, to Jan'y 9, 1874?

Answer. There were several removals during that time. They were Jim Ladd, some barber & tailor shops and several other businesses which I do not now remember. Jim Ladd moved to Salt Lake.

Ques. Who moved a business from the vicinity of the Roush building to a point down town, up to January 9, 1874?

Answer. Swansen, the tailor, & L. Marx; L. Marx moved to the corner of Main and Wood streets, and Swansen moved next door to Marx. I think they moved a distance of from 200 to 300 feet. There were 2 buildings and a street between the International Hotel and Marx' place; from 100 to 125 feet between the International Hotel and Marcks' new place. Nearly all the auctions and public meetings were held & conducted in the vicinity of the Roush building.

Ques. Was the removal of the Marx business one of the causes that made the Roush building a less desirable place of business?

Answer. Yes.

Ques. State why the removal of a whisky shop one hundred &
113 fifty feet away made the Roush building a less desirable place of business.

Answer. Because there was less travel on that side of the street after the removal.

Ques. Was not the entrance to the theatre above the Roush building, a place where all the public meetings of the town were held?

Answer. It was.

Ques. Were there not near that place a sufficient number of saloons

to have enabled a tenant in the Roush building to have supplied himself easily with such comforts as such establishments afford?

(Defendant objects.)

Answer. I think not.

Ques. How much more do you think the monthly value of these premises would have been if it had been sufficiently surrounded with whisky shops?

(Defendant objects.)

Answer. I think it would have been of a little more benefit.

Ques. Did not Listner, Wyttenbach, Floweree, Marcks, Mather and King each have an establishment of this character within a distance of from 60 to 200 feet of the building at that time?

114 Answer. I do not think that Wyttenbach had a saloon at that time. I think the other parties named had such establishments within the limits stated. They were all, except two, located on the opposite side of the street from the Roush building.

Ques. Were there not two of the same kind of establishments located around the corner on Bridge st. within a distance of 300 feet of the Roush building?

(Defendant objects.)

Answer. None, except one, that I know of.

Redirect:

The theatre building has not been occupied since 1871, except occasionally for public meetings.

ROBERT CARR.

EDWARD M. HOYT sworn:

I have resided in Helena, M. T., since A. D. 1865. I have been informed and have been more or less acquainted with the rental value of property on Main street, in Helena, since the year A. D. 1865. I am acquainted with the Roush property (lots 3 & 99 in block 20) situated on Main street. I have known the property since 1866. I was not particularly acquainted with the rental value of that property, but had a general knowledge of the rental value from 1869 to 1874. Up to the spring of 1869 that property was desirable for business purposes.

115 After the fire of 1869, the buildings that were erected on those were not so valuable. Business began to decline and move further down Main street. The rental value of the property from Nov., 1871, to January, 1874, was, I think, about $25.00 a month. The buildings on each side of the Roush building were wooden structures. The Roush building was a frame structure, 10 or 12 feet in width, and no fire-proof connected with it, and no cellar. From the Roush building to the head of Main street, the buildings were of wood and lumber. From and after 1871, the theatre building was not occupied except for public meetings. I have noticed vacant buildings at different times between Bridge street and two buildings lower down than the Roush building on Main street. I mean that I have seen frequently vacant buildings in the vicinity of the Roush building or in the Roush block. I am, by occupation, a real estate agent in Helena, and have been since the fall of 1874, and prior to that time have been for a short period. It has been difficult to rent property in that portion of the town since 1869, or to keep it rented. I think the Roush property on Main street has had no rental value since the fire of January 9, 1874. The lots there have not been built upon or occupied since that time, except one building

116 on a lot adjoining the Roush lot. This building was put up in the

fall of 1874, and has been vacant since then with the exception of 3 or 4 months.

Ques. Are you acquainted with lots 16 & 17 in block 40?

Answer. I am. They are vacant lots; they have been vacant since I have known them in 1869. There are 4 or 5 lots adjoining lots 16 & 17 which are vacant. I do not think that lots 16 & 17 have had any fixed or determinate rental value since A. D. 1871. I know of no lots having a ground rental value, except lots on Main street. There are no lots off of Main street in demand for that purpose.

Cross-examination:

Question. State what knowledge, if any, you had of the rents paid for the Roush property on Main street during the years 1871, '2, & '3, and state it separately for each year.

Answer. I had no personal knowledge concerning the matter.

Ques. You have stated in your direct examination that the rental value of the Roush property on Main street from Nov., 1871, to January, 1874, would be in your opinion $25 per month. Do you not know that during said period of time, or for the greater part thereof, the
117 property rented for from $40 to $75.00 per month?

(Defendant objects.)

Answer. I do not know, from my personal knowledge, that it did or that it did not. I do not know, from my own knowledge, what buildings on either side of the Roush buildings rented for at that time.

Ques. Do you not know that the finest building in this town was situated directly opposite the Roush building at the time in question?

Answer. The International Hotel was situated nearly opposite. I think it was the most expensive building in town.

Ques. Did not business at the upper end of Main street continue to be good until the fire of 1874?

Answer. I do not consider that it continued to be as good as it was previous to the fire of April, 1869.

P. T. WILLIAMS sworn.

I reside in Helena, M. T. My occupation, water agent. I am acquainted with Henry T. Fort, one of the defendants. I have been acquainted with him since he first came to the country. He left this country, in November, 1873. He occupied the same room with me during that summer, and up to the time he left. I know the Roush
118 property on Main street. Mr. Fort tried to rent the property; he was unable to do so, as business had left that part of the town or declined to such an extent as to destroy the demand for buildings in that vicinity on that side of the street. Fort was trying to rent the property. He was lying around with nothing to do. He authorized me to rent it. The Roush building was burned in the general fire, Jan'y 9, 1874. The fire broke out in Chinatown, and consumed the greater portion of the business houses on Main street. The Roush property, including sidewalk and building, was very much dilapidated; and also other property in that vicinity on that side of the street. The Roush property could not have been rented for anything after the fire in January, 1874. There has been no demand for ground rent of the Roush lot or lots in the same locality since that time. The lots 16 & 17 in block 40 could not have been rented for the purpose of putting buildings thereon, nor for anything unimproved.

Cross-examination:

I know Fort wanted to rent the property. He talked with me about

the matter. He wanted me to assist him in so doing. This is all I know about his trying to rent it. I made no effort to rent it. I know
119 that Fort made efforts to rent it.

Ques. Do you know that Fort made an effort to rent it?

Answer. From conversations he had with me I inferred that he wanted to rent it.

Ques. Was not the depreciation of business general instead of local, from 1871 to 1874?

Answer. I do not consider that it was as general as it was local.

Ques. Did you not after the fire of 1869 become interested in business at the lower end of Main street?

Answer. I did.

Ques. Do you know, of your own knowledge, the price that any building rented at on either side of Main street during that time, within 5 or 10 doors of the Roush building; if so, what one and at what price?

Answer. I do not know at what price any building rented for within that distance. I was not then in the real estate business, or I might have known more about it.

Ques. Were not all the in-door public meetings held in the building adjoining the Roush building, and the out door meetings held in front of it?

120 Answer. I do not think they were all held there, but that most of them were.

Ques. What solitary public meeting was held anywhere else than next door to the Roush building during that time?

Answer. I cannot name any in particular.

Ques. Were not all public receptions & meetings held there?

Answer. I think they were mostly held there.

Ques. If not all held there, name one held elsewhere.

Answer. I do not remember of any being held elsewhere.

Ques. As to lots 16 & 17, block 40, is not the fact of their lacking a rental value due to the fact that a period for their rent was not or could not be fixed?

Answer. It doubtless would make a difference.

Re-direct:

Ques. State what receptions, if any, you know of having been held in the theatre building from the fall of 1871 to 1874.

Answer. I cannot recall any particular one at the present time.

Ques. State, if you can, how many public meetings on an avarage were held per annum at this theatre building from 1871 to 1874.

Answer. I cannot state; I kept no memorandum.

121 Ques. Were such meetings frequent or otherwise?

Answer. Not very frequent.

Ques. Do you know Fort made an effort to rent it?

Answer. I have told all I know about it in my answer to the last question.

Ques. What business had declined in the vicinity of the Roush property?

Answer. The theatre had declined and ceased to act. The Blake butcher shop, I think, was the only business running at the time to which I refer, 1873.

Ques. What house on that side of the street, between Travis' stable and Bridge street, was closed beside the theatre?

Answer. I think all the buildings were closed excepting Blake's butcher shop, on the corner of Bridge and Main streets.

Ques. Did not a man by the name of Lyon carry on a tailor shop there in 1873?

Answer. I do not know.

Ques. Was there but one house between the Roush building and Blake's butcher shop?

Answer. I think there were more than one.

Ques. Did not a man by the name of Wolf have a barber shop there in 1873?

122 Answer. I could not say that he had a shop there in 1873. He had one there at one time.

Ques. Were not the public in-door and out-door meetings held in or outside of that building in 1873?

Answer. I think they were.

Ques. Was not the principal hotel in this town directly opposite the Roush building?

Answer. Nearly opposite.

Ques. Was not the principal saloons and gambling houses located in the vicinity of the Roush building?

Answer. Yes; some of them were on the opposite side of the street. The principal livery stable & tobacco stores were located in the vicinity.

Ques. What dilapidation was there in the sidewalk before referred to?

Answer. It was torn and broken up in places. Do not know in how many places it was broken up.

Ques. What dilapidation was there in the Roush building?

Answer. Nothing more than there was in other buildings in the vicinity. The buildings along there had a vacant and deserted appearance. The sidewalk was rough, and had a hole in it which might have been above the theatre.

(Signed) P. T. WILLIAMS.

123 WM. L. STEELE, of lawful age, was duly sworn, and testified as follows, to wit:

I am a physician by profession. I reside in Helena, M. T.; have resided here since Dec., 1864. I was sheriff of Lewis & Clarke County, and as such sheriff sold the Roush property purchased by Fort, Nov'r 10, 1871. I remember lots 16 & 17 in block 40, purchased by Fort, as before stated. The lots were then and now are vacant. These lots have no ground-rental value, nor do I think they have had any such value since Fort's purchase. I know lot 7, in block 40, and remember the building that was on it. I am not well enough acquainted with the building to estimate the value of the same. It was a cheap building.

Ques. State what that building was worth, separate and apart from the lot.

(Plaintiffs object.)

Answer. $25 or $30. It evidently cost more than that to put it there. I am speaking of that part of the building which was on lot No. 7; that would have made the whole building worth $50 or $60; but I have no idea it would have sold for that amount. The building had very little, if any, rental value. I know lots 99 & 3, block 20, on Main street,

124 that belonged to Roush at the time of the sheriff's sale to Fort. The building on these lots was a frame building. The character of the buildings in that vicinity was not first class, nor was it a desirable locality.

(Plaintiffs object to the foregoing answer, so far as it relates to the character of the buildings, as incompetent.)

The buildings in that locality were not all occupied from 1871 to the

time of the fire, Jan'y 9, 1874. The buildings from Travis' stable up to Bridge street were not all vacant during that period, but there were more or less of them vacant during the whole time.

Ques. What was the rental value of the Roush building from 1871 to 1874?

Answer. I do not know.

Cross-examination:

Ques. Is there any property of value in this town, the use of which is not worth something?

(Defendant objects.)

Answer. That would depend on the length of time you were entitled to use it. A short lease of a piece of ground would be of less value than a long one. A lease to ground for a term of years, sufficiently long to justify the lessee in making improvements or erecting buildings
125 thereon, would be of more value than a lease for a term of years so short as not to justify the making of such improvements.

Ques. So when you say that lots 16 & 17 have no rental value, is it because no term is fixed sufficiently long to justify their occupancy for a useful purpose?

Answer. Not altogether.

Ques. What makes them useless?

Answer. Because those lots could only have been used for the purpose of erecting residences thereon. I don't believe that any person would have built a house upon them for a limited length of time, unless the time should exceed 25 years.

Ques. Still it is true, is it not, that the length of the time determines the value of the lease?

Answer. Yes, sometimes. I do not know the value of lots 16 & 17. In my judgment they are worth $200 or $250. I think they might be sold for that sum. I cannot state positively what they are worth. I may be wrong in this estimate. I have no certain information of what they are worth. I think John Kinna would be more likely to know the value of those lots than I am myself. Do not think he would know any more than I do in regard to the value of their use. I do not know
126 what the building on lot 7 cost. I have no idea or information concerning the cost. I would estimate the cost of the building to have been $150 or $200. I think it had a shingle roof. I hardly think the building could have been rented at all. It might have been rented for a short time for a small rental, say for $4 or $5 per month for a short period. The building might have been worth to a party owning the ground on which it was situated not over $200.

(Defendant objects to the last answer.)

Do not remember that there were any buildings vacant all the time from Nov. 10, 1871, to the time of the fire, Jan'y 9, 1874, in the vicinity of said lots 3 & 99. I think there were no buildings vacant there for any great length of time, except between the theatre and Blake's butcher shop.

W. L. STEELE.

ROSS DEEGAN sworn.

My name is Ross Deegan; I am 47 years of age; by occupation, stable-keeper; I reside in Helena, M. T.; I have resided here since 1866, on Rodney street; I am acquainted with the lot adjoining the Dana House on the north; I remember the building that formerly stood on that lot.

127 Ques. State, if you know, whether the building referred to by you stood wholly upon one lot or not.

Answer. I do not know.

Ques. Do you remember when the building referred to by you stood upon the lot adjoining the Dana House?

Answer. I can't say positively; but think it stood there in 1869 & 1870. It was a common building constructed of lumber. I would not call it a frame building; it was boarded up and down, & battoned. It had a cornise in front. I never noticed it particularly.

Ques. State whether or not the lumber or boards in this building were dressed or planed.

Answer. They were not. I think the building was whitewashed.

Ques. What would you estimate the value of this building to be at the time you saw it?

Answer. I cannot state.

Ques. State as near as you can the value of the building at the time you saw it, or at the time it was taken down.

Answer. It is simply guesswork with me. It might have been worth one hundred & fifty dollars.

128 Ques. If this building was situated upon two different lots, belonging to different owners, and had to be removed, what would you estimate its value in such case?

(Plaintiffs object.)

Answer. That would depend upon circumstances. If the building stood partly upon another lot, say a few inches, it would not cost much to move it.

Ques. Suppose one-third of it stood upon one lot and ⅔ upon another lot belonging to another party, what then would be the value of the building, if it had to be removed?

(Plaintiffs object.)

Answer. It would not be worth the price of the lumber, if it had to be torn down.

Question. What, if anything, would be the ground rental value of this lot (7 in block 40) without any building upon it?

Answer. I cannot say. I never knew of any ground being rented in the town.

Question. State if you are acquainted with property in and about that vicinity on Rodney street.

Answer. I am. I have dealt in and own property there in that vicinity, on Rodney street.

Ques. State whether or not such a building as that referred to
129 could be rented readily, as a general rule, since Nov. 10, 1871?

(Plaintiffs object.)

Answer. Don't think anything could be rented very readily in that vicinity.

Ques. State whether or not, in your opinion, such a building as that referred to could have been rented or kept rented since Nov., 1871.

(Plaintiffs object to question as irrelevant.)

Answer. It could have been rented, but do not know that it could have been kept rented. I know lot owned by John Kinna opposite Doct. Steele's residence on Fifth avenue. I know the ground lying 50 feet west of the Kinna lot. The lots from and including the Kinna lot to the Presbyterian church are all vacant. The distance to which these vacant lots extend is from 200 to 300 feet.

Ques. State what, if anything, would be the ground rental value of

the lot adjoining the Kinna lot on the west, or what would have been its ground rental value at any time since 1871.

Ans. It had no value that I know of. Never knew of any ground rental value being attached to vacant lots in the town.

Cross-examination:

130 I do not know whether the building referred to was battoned all around or not. Do not know what it rented for; I think it rented for $6 per month. I think it was worth in 1871 $5 or $6 per month. My building across the street from this one was of a larger size; it was 18 x 24 feet. I think the building in question was 14 x 20 feet. If the building was 14 x 29 feet on the inside it would be worth more than I have estimated. I do not say that none of the boards in the building were planed.

Ques. Are not the lots 16 and 17 as fine lots and as eligibly situated as any lots in town?

Answer. I think they are very desirable lots.

Ques. Do you know the number of buildings erected by Roush on Rodney street since 1867 and up to 1870?

(Defendant objects to question as irrelevant.)

Answer. I think he built 5 houses in a line on Rodney street, this being one of the houses.

Redirect:

Question. Do you know whether the building of houses by Mr. Roush on Rodney street proved to be a profitable investment?

(Plaintiffs object.)

Answer. I do not know.

ROSS DEEGAN.

131 JAMES BLAKE, being duly sworn, testified as follows:

My age is 48 years; I reside in Helena, M. T.; have resided here over 10 years; resided on Rodney street most of the time; my occupation, a butcher. I am acquainted with the lot north of and adjoining the Dana house. I remember the building that was on that lot; it was a one story building, but cannot give its dimensions. It had two rooms—front and back room. It was a wooden board building, with shingle roof. It was constructed of rough boards, I think.

Ques. If the building was situated $\frac{2}{3}$ on one lot and $\frac{1}{3}$ on another lot, belonging to different owners, and had to be removed, what would you estimate its value to be in such case?

(Plaintiffs object.)

Answer. If I needed anything of the kind as refuse lumber it would be worth $40 or $50.

Ques. Suppose if it had to be removed instead of torn down, what then would be its value?

(Plaintiffs object.)

Answer. It would have no value for me.

(Plaintiffs object to the answer.)

132 Question. What do you mean when you say it would have no value for you?

(Plaintiffs object.)

Answer. The expense of moving it would be as much as the value of the building where it now stands if it had to be removed a reasonable distance from where it stood.

Ques. What was the value of the building, where it stood, independent of the lot?

Answer. Probably $100.

Witness then proceeded to state in answer to questions: I reside within about 30 feet of this lot; have resided there about 10 years.

Ques. What, if anything, has been the ground rental value of this lot since Nov., 1871?

Answer. It has been worth $5 per month.

Ques. Could it or could it not have been rented for that amount?

Answer. I think it could have been. I am acquainted with lots on Fifth avenue, fifty feet wide and one hundred feet deep, running back to the court-house square. Those lots in that vicinity—the Kinna lot to the Presbyterian church—are now vacant The vacant lots in-
133 clude the Roush lot. These vacant lots embrace a space (exclusive of the street) of about 100 feet.

Question. What do you mean by ground rent when you state that a lot adjoining the Dana house would be worth five dollars per month?

(Plaintiffs object.)

Answer. If a man could have obtained a lease of the same in A. D. 1871, for three or five years, the ground rent would have been worth $5 per month.

Ques. State whether or not buildings in that vicinity on Rodney street that were to rent have been rented readily since Nov., 1871?

(Plaintiffs object.)

Answer. I think they have been until within the last year and a half.

Cross-examination:

The cost of erecting such a building in 1871, I should think, would be about $300. If a party owned the ground upon which that building stood in 1871 I should think it would be worth $100.00. It had been some time in use, and was out of repair. In my opinion the rent of that building & ground from the 10th Nov., 1871, to the present time
134 would have been worth six or seven dollars per month. I think no rental value would attach to the lots on Fifth avenue.

Ques. What, in your opinion, would be the rental value of lots 16 & 17, in block 40, if a party desired to place improvements thereupon suitable for a dwelling house or a place of business?

(Defendant objects.)

Answer. I think the rental value would be $3 per month for each month.

Redirect:

Ques. When you say that $6 or $7.00 per month would be a reasonable rent for the property on Rodney street from 1871 till now, do you mean to say that that would be a reasonable rent if a tenant could be found for the entire time, or do you mean to say that in your opinion the property could have been kept rented at that price since?

(Plaintiffs object.)

Answer. I mean to say it could have been made to average that for the entire time.

Ques. State whether or not, in your opinion, that building could have been kept rented regularly since 1871?

Answer. I do not think it could.

135 Ques. State whether that building had been vacant several months before it was moved?

(Plaintiffs object.)

Answer. It was vacant, but cannot say how long.

Ques. State whether you know of any instance in the town Helena, where a vacant lot has been rented for a ground rent?

(Plaintiffs object.)

Answer. I do not at present.

Ques. Do you mean to say that in your opinion a tenant could have been found who would have paid a ground rent for the property on Rodney street, only being allowed to keep his building upon the same 3 or 5 years?

(Plaintiffs object.)

Answer. I do.

Ques. Do you know of any applicants for property in that vicinity to rent at a ground rent?

(Plaintiffs object.)

Answer. I did at the time, but know of none now. I would have leased lots there myself. I think this property was rented in 1872. I think Charley Roth occupied it for a butcher shop. I think he was
136 there the whole season. It was also occupied as a China wash-house. I am not certain whether or not Charley Roth occupied that building or a building now standing adjoining. I mean to state that lots 16 & 17 would have been worth $3 per month rent providing a tenant could have been found, but I do not mean to say that one could have been found.

JAMES BLAKE.

MARCUS LISSNER sworn.

My name is Marcus Lissner. My age, 40 years. I reside in Helena, M. T. Occupation, a business man. Have resided at the upper end and east side of Main street since A. D. 1865.

Ques. State if you are acquainted with lots 99 & 3 on Main street, known as the Roush lots?

Answer. Yes, I know the lots. I knew them in 1869, after the first fire. There was a building upon it, used as a barber shop by one Wolf. After Wolf, it was occupied successively by McEvily, Dusold, and Carr.

Ques. Were you acquainted with the buildings situate between the Roush building and Bridge street in the years 1871–2–3 & 4?

(Plaintiffs object.)

137 Answer. I was acquainted with the buildings clear up to Bridge street. The theatre building was the next building above the Roush building.

Ques. State, if you remember, about the time the Langrishe troupe ceased to act in the theatre building?

(Plaintiffs object.)

Answer. About the fall of 1870.

Ques. State whether or not the theatre building was used for any theatrical purposes after Langrishe quit acting there?

(Plaintiffs object.)

Answer. It was used afterwards for a short time by Couldock and daughter.

Ques. For how long a time did they (the Couldocks) use it?

(Plaintiffs object.)

Answer. I can't state how long they used it.

Ques. Was the theatre building used for theatrical purposes as late as the fall of 1871, or the spring of 1872?

(Plaintiffs object.)

Answer. I believe it was used by a minstrel troupe.

Ques. When did the theatre building cease to be used for theatrical purposes?

(Pl'ffs object.)

Answer. I do not think it was used for theatrical purposes after the minstrel troupe left it. It might have been in 1871 or '2. I can't remember.

138 Ques. State whether or not the theatre building was used regularly after the Langrishe troupe ceased to act in it?

(Plaintiffs object.)

Answer. It was not used regularly after that.

Ques. State what effect, if any, the closing of the theatre had upon property in that vicinity?

(Pl'ffs object.)

Answer. It had an effect to a certain extent upon some kinds of business. I do not think that it affected property very much.

Ques. State whether or not buildings between the Roush lot and Bridge street were all occupied during the years 1872 & 3, and until its destruction by fire in 1874.

Answer. They were not.

Ques. What portion of them were vacant?

Answer. There was one room in the theatre building that was vacant all of the time. After Marcks moved out of his place, that was empty—the other room in the theatre building. There was a small house occupied for a tailor shop adjoining the theatre building that was also vacant. These are all the vacant buildings that I now remember of.

Ques. State what building in that time between the Roush building and Bridge street were occupied.

139 Answer. The building on the corner of Bridge and Main streets was occupied all the time. The tailor shop was occupied more than half of the time up to the time of the fire in 1874.

Ques. State whether or not there was any decline in the rental value of property in that locality during that period.

(Plaintiffs object.)

Answer. The rents went down; they declined considerable.

Ques. Was there any depreciation in the value of property in that locality, and, if so, how much?

(Plaintiffs object.)

Answer. Property went down considerable in 1871 & 2.

Ques. State what, in your opinion, was the rental value of the Roush building on Main street during that period.

Answer. It depends upon what customers or tenants a man could get. It might have brought $20 to $30, or $35 per month, or thereabouts.

Cross-examination:

Ques. What building did you own and how was it situated with reference to the Roush building?

Answer. I owned a building corner of Main and Bridge streets opposite and about 70 feet above. The International Hotel was directly

140 opposite of the Roush building.

Ques. Was not the International Hotel the finest and most expensive building in Helena?

(Def't objects.)

Answer. Yes, sir.

Ques. Was not that portion of Helena situated about the International during the years 1871–2 & 3 among the best business localities of said town?

(Def't objects.)

Answer. Yes, sir.

Ques. Was not the theatre used during said years by threatrical troupes and as a place of holding public and political meetings almost continually?

(Def't objects.)

Answer. Yes. They used it when it was wanted for public meetings.

Ques. Prior to the time of the fire, Jan'y 9, 1874, was not Bridge street, in the vicinity of the head of Main street, occupied or covered by business houses, and was there not a large number of persons doing business in that locality?

(Defendant objects.)

Answer. Yes. There were a good many small business houses on Bridge street and a good many persons doing business near the head of Main street.

Ques. State what building on Main street, from the Roush prop-
141 erty to Bridge street, was unoccupied in 1871 or 2.

Answer. I think the buildings were all occupied at that time.

Ques. State what building was unoccupied in 1873 from the Roush property to Bridge street, and, if any, what portion of that year.

(Def't objects.)

Answer. The Marck's place in the theatre building must have been empty six or seven months. The tailor-shop there was empty seven or 8 months.

Ques. Was not the theatre occupied frequently, during 1873, as a place for holding public & political meetings?

(Defendant objects on the ground of repitition.)

Answer. Yes, sir. Meetings were held there during 1873.

Ques. What time in 1873 did Marcks move out of the theatre building?

Answer. I do not know the exact time.

Ques. Do you know what rent was being paid for the Rouch building in 1871 & 2?

Answer. I do not know. I think he got a pretty good rent.

142 Ques. Was not the Roush building, for 1871 & 1872, worth a rental value of $75 per month?

Answer. I cannot tell what the rent would have brought at that time.

Ques. Do you know what rent was paid for the Rouch building in 1873?

Answer. I do not know what rent he got for it.

Ques. Do you know what would have been a reasonable rent or what could have been obtained for the Roush building in 1873?

Answer. From $20 to $30 per month.

Ques. Was there any very material decline in the value of property on the upper portion of Main street before the fire of January, 1874?

Answer. There was a decline. Property went down a little, or to a certain extent, but not very much.

Ques. Were you acquainted with what was being paid as rent for any building in the vicinity of the Roush property during the years 1871, 2, or 3?

Answer. I do not know what rent was being paid.

Ques. You have spoken in your direct examination about a room in the theatre formerly occupied by McFarland; describe that room; how it was situated and the size of it?

143 Answer. It was situated on the left hand side going into the

theatre. Its size was about 14 × 25 feet. There was no rear entrance or light.

Ques. Was not the upper portion or second story of the theatre building occupied as offices during the years 1871, 2, & 3?

Answer. Yes, sir.

Ques. State if you were not renting a portion of the property owned by you which you have mentioned, for a large rent, during the years 1871, 2, & 3.

(Defendant objects.)

Answer. I rented the basement of my premises for the years 1870, 71, and 2 for $125 per month.

Ques. State if there was any building vacant upon the east side of Main street opposite to the Roush building, between Bridge and Wood streets, during the years 1871, 2, and 3.

Answer. The buildings were all occupied on the east *east* side of Main between Bridge & Wood streets during those years.

Redirect:

Ques. State what difference there was, if any, between the east and west sides of Main street, in the locality referred to, in the character of the buildings & improvements.

Answer. The buildings were better on the east side.

144 Ques. State which of the two sides of Main street was the most popular as a place of business during the years 1871, 2, and 3.

(Plaintiffs object.)

Answer. The east side.

Ques. On which of the two sides of Main street would property command the highest rents during that period?

Answer. I could not tell. The property on the east side was occupied by the owners thereof. If there had been any property to let the east side would have commanded the highest rents.

Ques. How often were public meetings held in the theatre building during the years 1871, 2, and 3?

Answer. I cannot tell how often they were held there; not very often; but when they were called they were held there.

MARCUS LYSTNER.

GEO. W. FOX, being first duly sworn, testified as follows:

My name is George W. Fox; my age 34 years; residence Helena, M. T.; occupation, a banker.

Ques. State if you are acquainted with the Roush lots on Main street, known as the Roush property?

Answer. I am. I don't know whether there is one lot or more. The witness proceeded to state, in answer to questions, I have been

145 acquainted with that property since July 1, 1872, the time I commenced to collect rents for that house. The building at that time was occupied by Capt. Dusold. He was paying $20 per month rent. Do not know how long he had occupied it before that time. He occupied it for two months from July 1, 1872. I was collecting this rent for Mr. Fort, the defendant. The next rent I collected for this property was from Mr. Carr, in March, 1873. Between the time I collected rent from Capt. Dusold to March, 1873, I collected no rent for the property. Mr. Fort may have returned from the east and collected rent or it may have been vacant in the meantime. I collected rents for this property for Mr. Fort while he was absent from the Territory.

Ques. State what other business, if any, you transacted for Mr. Fort in his absence.

(Plaintiffs object.)

Answer. He left some notes with me for collection against different parties.

The witness then proceeded to state, in answer to questions: I received rent from Mr. Carr for the Roush building on Main street, from March until July, 1873, at $20 per month rent, and from August until November, 1873, at $12.50 per month. The property was vacated by Mr. Carr Nov., 1873. The property remained unoccupied from
146 Nov., 1873, until the fire of Jan'y 9, 1874. The total amount of rent collected by me for this property, as shown by the bank book, was $170.00.

Ques. State whether or not you were able to obtain for this property any greater rent per month than that collected from Dusold and Carr during that period.

(Plaintiffs object.)

Answer. I was unable to get any greater rent for the property from other parties.

Ques. State if you know the reason, if any, why the rent of Carr was reduced from $20 to $12.50 per month.

(Plaintiffs object.)

Answer. It was reduced to induce him to retain the property, the former price being too high.

Ques. State whether or not, during this period, you found any difficulty in obtaining tenants for this Roush property.

(Plaintiffs object.)

Answer. My recollection is there were no other applicants for the property. I had the renting of it while Carr was occupying the property. I had to make concessions on the rent to induce him to remain in possession. I also had to make some improvements, as a further inducement to induce him to remain in possession.

147 Question. State what was the cost of the improvements made upon the property while Carr was in possession.

(Plaintiffs object.)

Answer. According to the bank books, the improvements cost $58.20.

Ques. State what were these improvements.

(Pl'ffs object.)

Answer. Putting a new shingle roof on the building, a skylight in the roof, and replacing window-lights in the doors.

Ques. What effort, if any, did you make during that period to rent the property and to keep it rented?

Answer. When it was vacated I posted a notice for rent on the door. I used due diligence to rent it. I had no other applicant for it after it was vacated.

(Plaintiffs object to the last portion of the foregoing answer.)

Ques. Were you in Helena at the time of the fire January 9, 1874?

(Plaintiffs object.)

Answer. I was.

Ques. Was Fort, the defendant, residing in Helena at the time of the fire, Jan'y 9, 1874; and, if not, where was he residing?

(Plaintiffs object.)

148 Answer. He was not residing in Helena at that time. His post-office address was Huntsville, Missouri.

Ques. State, if you know, where and under what circumstances that fire originated?

(Plaintiffs object.)

Answer. It originated in a Chinese building on West Main street; do not know under what circumstances it originated.

Ques. How far from the Roush building did the fire originate?

Answer. In my judgment, it was about 500 feet.

Ques. State what portion of the town of Helena was destroyed by this fire?

(Plaintiffs object.)

Answer. It was a general conflagration, destroying a large portion of the business portion of the town, including the Roush building.

Ques. State what, in your opinion, was the value of the Roush building that was upon this lot.

(Plaintiffs object.)

Answer. About $300.00.

Ques. State what, if anything, was the rental value of these lots after the building thereon was destroyed, from Jan'y 9, 1874, to the present time.

(Pl'ffs object.)

149 Answer. I had no application to rent them. I think they could not have been rented after the fire.

Ques. State what portion of that part of Main street has remained vacant since the fire?

Answer. All of the lots (excepting one) from the corner of Bridge and Main to the Union Brewery have been and remained vacant since the fire. The distance is about 300 feet.

Ques. State what acquaintance, if any, you have had with Henry T. Fort, the defendant, since Nov. 10, 1871?

(Plaintiffs object.)

Answer. I have had friendly, social, and business acquaintance with him.

Ques. State, if you know, what diligence he used, if any, in renting the property purchased at sheriff's sale belonging to Roush from the time of the purchase on Nov. 10, 1871.

(Plaintiffs object.)

Answer. I know of his trying to rent the property. I think he used due diligence in trying to rent it.

Ques. State in what manner the defendant, Fort, dealt with this property purchased by him.

(Pl'ffs object.)

Answer. He tried to rent and sell it, and did sell that part of the property situate on Fifth avenue.

150 Ques. Was there any difference in the management of this property by Mr. Fort in the degree of attention paid to it than to other property owned by him, or in the management of similar property by other owners?

(Plaintiffs object.)

Answer. There was not. He considered it as his own property and so treated it.

Ques. State what degree of diligence Mr. Fort exercised in the management of his property.

(Plaintiffs object.)

Answer. He was about as thrifty and prudent as any man I know of.

Question. Are you acquainted with lots 16 and 17 in block 40?

Answer. I am.

Ques. State, if you know, what, if any, disposition Mr. Fort made of this property?

Answer. He sold it on the 14th day of July, 1874, to C. J. Lyster, now deceased, for $150.00.

Witness here produced the deed of conveyance from Fort to C. J. Lyster, to the introduction of which in evidence the plaintiffs objected. The said deed, marked Exhibit A, was received in evidence, and is in the words and figures following, to wit:

151 EXHIBIT A.

This indenture, made the fourteenth (14) day of July, in the year of our Lord one thousand eight hundred and seventy-four, between Henry T. Fort and Annie E. Fort, his wife, of Fort Henry, Randolph County, State of Missouri, the parties of the first part, and C. J. Lyster, of the town of Helena, county of Lewis and Clarke, Montana Territory, the party of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the sum of one hundred and fifty ($150.00) dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, conveyed, and confirmed, and by these presents do grant, bargain, sell, convey and confirm unto the said party of the second part, and to his heirs and assigns forever, all those certain lots, pieces or parcels of land, situate, lying, and being in the town of Helena, county of Lewis and Clarke, Montana Territory, and bounded and particularly described as follows, to wit: Lot number sixteen (16) in block number forty (40), being eight (8) feet front on Fifth avenue and one hundred (100) feet deep; also lot number seventeen (17) in block number forty (40), being forty-two (42) feet front on Fifth avenue and
152 one hundred (100) feet deep; said lots being bounded northerly by Fifth avenue; easterly by property of Mrs. John Kinna; southerly by an alley, and westerly by property of Abraham Collett; together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, claim of homestead property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part of, in or to the above described premises and every part and parcel thereof, with the appurtenances.

To have and to hold, all and singular, the above mentioned and described premises, together with the appurtenances, unto the said party of the second part and to his heirs and assigns forever. And the said parties of the first part and their heirs, the said premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against the said parties of the first part and their heirs, and against all and every person and persons whomsoever lawfully claiming or to claim the same, shall and will warrant, and by these presents forever defend.

153 In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

H. T. FORT. [SEAL.]
ANNIE E. FORT. [SEAL.]

Signed, sealed & delivered in the presence of—

STATE OF MISSOURI,
County of Randolph, ss:

On this 27th day of July, in the year of our Lord one thousand eight hundred and seventy-four, personally appeared before me, clerk of the said circuit court in and for said county, Henry T. Fort and Annie E. Fort, his wife, whose names are subscribed to the annexed instrument as parties thereto, personally known to me to be the same persons described in and who executed the said annexed instrument as parties thereto, who, each of them acknowledged to me that they, each of them respectively, executed the same freely and voluntarily and for the uses and purposes therein mentioned. And the said Annie E. Fort, wife of the said Henry T. Fort, having been by me first made acquainted with the contents of said instrument, acknowledged to me on examination apart from and without the hearing of her husband, that she executed the same, freely and voluntarily, without fear or compulsion, or
154 undue influence of her husband, and that she does not wish to retract the execution of the same.

In testimony whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

{ SEAL OF CIRCUIT COURT. }

W. T. AUSTIN,
Clerk of said Court.

(Endorsement:) Recorded Aug. 19, 1874, @ 1 o'clock p. m., in Book U, of deeds, page 446 of the records of Lewis & Clarke County, M. T. John N. Heldt, co. recorder. Geo. D. C. Hibbs, deputy.

Witness then proceeded to state in answer to questions: I am these lots (16 & 17 in block 40) and have been such owner since March, 1877. I paid for them $400 at public sale. These lots and lots adjoining them have always been vacant.

Ques. State what, if any, ground rental value, lots 16 & 17, block 40, have had since Nov. 10, 1871.

(Plaintiff objects.)

Answer. I think they could not have been rented. I have had no application to rent them.

Ques. State whether or not vacant property outside of Main
155 street, in Helena, has any ground rental value to your knowledge.

(Plaintiffs object.)

Answer. I don't know of its having any such value.

Ques. What, in your opinion, was the rental value of the Roush building on Main street, from Nov. 10, 1871, to Nov. 10, 1872?

(Plaintiffs object.)

Answer. Not more than $20 per month.

(Testimony of Fox resumed on page 178.)

The defendants here introduced in evidence the deposition of Frederick Reece, marked Exhibit B. To the introduction of said deposition, and its being received in evidence, the plaintiffs objected. Said deposition is as follows, to wit:

EXHIBIT B.

Deposition of Frederick Reece.

In the district court, third judicial district, Lewis and Clarke County, Montana Territory.

GEO. ROUSH AND ELIZA ROUSH, PLAINTIFFS,
vs.
HENRY T. FORT ET AL., DEFENDANTS.

It is hereby stipulated between the attorneys for the said plaintiffs and the attorneys for the said defendant Fort, that the deposition of Frederick Reece may be taken in this cause at the office of Cullen & Sanders, in the town of Helena, M. T., on the 14th day of June,
156 A. D. 1877, and that said deposition, when so taken, may be read in evidence at any trial of this action, either before the referee or the said court, subject only to objections as to the objections to the competency and relevancy of the evidence.

SANDERS & CULLEN,
Att'ys for Plaintiffs.
WOOLFOLD & BULLARD AND H. M. PORTER,
For Defendant, Henry T. Fort.

In the district court, third judicial district, Lewis and Clarke County, Montana Territory.

GEORGE ROUSH ET AL., PLAINTIFFS,
vs.
HENRY T. FORT ET AL., DEFENDANTS.

Deposition of Frederick Reece, a witness for the defendants in the above entitled cause, taken before me, Alex. H. Beattie, clerk of the third judicial district court, at the office of Mess. Sanders & Cullen, in the town of Helena, M. T., by stipulation of parties on this 14th day of June, A. D. 1877, commencing at 4 o'clock p. m. of said day in pursuance of said stipulation, W. F. Sanders, esq., appearing for the plaintiffs, and H. M. Porter, esq., appearing for the defendants.

FREDERICK REECE being first duly sworn, deposes and says:

157 Int. 1. What is your name, age, and place of business?

Ans. Frederick Reece; am 52 years old; live on Benton road; toll-road keeper.

Int. 2. State whether you were, on the 10th day of November, A. D. 1871, acquainted with a frame building then on lot seven, block No. 40, in the town of Helena.

Ans. Am acquainted with said building.

Int. 3. State, if you can, the value of said building at that time.

Ans. To my best knowledge the building was worth twenty-five dollars.

Int. 4. State what your means and opportunities were of knowing the value of said house.

Ans. It was a kind of a frame building, attached to what is now the kitchen of the Dana House.

Int. 5. State, if you know, whether said house was all on said lot seven or partly on another lot.

Ans. It was partly on lot six.

Int. 6. What proportion was on lot 6?

Ans. The largest part was on lot 7—a few feet; I cannot tell.

Int. 7. State if you were present at the sale of said lots six and seven on the 10th day of November, A. D. 1871, under execution in
158 favor of H. T. Fort; and if so, who purchased said lots six and seven?

Ans. I was present; I purchased lot six and Fort purchased lot seven.

Int. 8. State what the value of the house was which stood on lot six at that time—the value of that part of said house.

Ans. The value was about nine dollars; I got that amount for my part of the said house.

(Objected to by pl'ffs' att'y as incompetent.)

Int. 9. What could you have purchased the part of said house for that stood on lot seven?

Ans. I believe he was willing to take eleven dollars for it.

(Objected to by pl'ffs' att'y as incompetent—objection as to both question & answer.)

Int. 10. State how long said building stood on said lots after said sale.

Ans. I don't know exactly; a year or two; I can't tell.

Int. 11. What was the value of the rent of the said house from the time it was sold until it was removed?

Ans. It was rented two or three months of said time at five dollars per month.

Int. 12. State whether or not five dollars per month was a reasonable rent for it.

Ans. I believe it was at that time.

159 Int. 13. State whether or not it was occupied the remainder of the time between the time of the sale and the time it was removed.

Ans. I believe not.

(Objected to by pl'ffs' att'y as incompetent—objection both to question and answer.)

Int. 14. State, if you know, why said house was not occupied the remainder of said time except for two or three months, as you have stated.

Ans. There was no call for it that I know; Mr. Allen had the key for it most of the time.

Cross-examination:

Cross-int. 1. What was the size of this house; was it shingled; had it doors, windows, and floors?

Ans. It was—I don't know the size; it was shingled; it had a floor, so far as I know; had two doors and two windows; am not certain.

Cross-int. 2. How do you know where the line is between lots six and seven?

Ans. We measured it a couple of times; Mr. Fort and I measured it; he told me where the line was.

Cross-int. 3. Was the house plastered or ceiled?

160 Ans. I don't know; I think there was lining over head; I believe there was no plastering or ceiling.

Cross-int. 4. What became of the house?

Ans. Allen took it down.

Cross-int. 5. What would it cost to build such a house as that one?

Ans. I don't think it would cost more than a hundred dollars.

(Question and answer objected to by defendants' attorney as incompetent.)

Cross-int. 6. What would the lumber, shingles, glass, nails, windows, & hardware cost?

Ans. I don't think to build the house it would cost to run over one hundred dollars.

(Question and answer objected to by defendants' attorney as incompetent.)

Cross-int. 7. How many feet of lumber would it take to build it besides the doors, shingles, & windows?

Ans. I can't tell how many feet of lumber was in it; I can't tell the size of the building.

(Same objection as before.)

Cross-int. 8. Did you try to rent the building?

Ans. I rented it to Mr. Votaw for five dollars per month; for how long I don't know.

Cross-int. 9. Did you try to rent it to any one else?

161 Ans. Not that I know of; there was another man in it besides Votaw; for how long I don't know; he paid five dollars per month also for rent.

FREDERICK REECE.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

I, Alex H. Beattie, clerk of the 3rd jud. dist. court in and for the county & Territory aforesaid, do hereby certify that the witness, Frederick Reece, in the foregoing deposition named, was by me duly sworn to testify the truth and nothing but the truth in the said action; that the said deposition was taken at the time and place mentioned in the annexed stipulation, to wit, at the office of Sanders & Cullen, in the town of Helena, M. T., on the 14th day of June, A. D. 1877, commencing at 4 o'clock p. m. of said day and continued till deposition was finished; that said deposition was reduced to writing by me, and when completed, was by me read to said witness as he requested, and corrected by him, was by him subscribed in my presence.

In witness whereof I have hereunto set my hand and the seal of said court upon this 14th day of June, A. D. 1877.

[SEAL OF COURT.] A. H. BEATTIE, *Clerk.*

162 The defendant here also introduced in evidence a portion of the deposition of Henry T. Fort, marked Exhibit C. To the introduction of which said deposition the plaintiffs objected. Which said deposition is as follows, to wit:

Stipulation.

In the district court of the third judicial district of the Territory of Montana, in & for the county of Lewis & Clarke.

GEORGE ROUSH & ELIZA ROUSH, HIS WIFE, plaintiffs,
vs.
HENRY T. FORT, FREDERICK REECE, AND Isaac W. Stoner, def'ts.

That the deposition of Henry T. Fort, one of the above-named defend-

ants, a witness on his own behalf, may be taken before Charles Allen, clerk of the county court of the county of Randolph, State of Missouri, at the office of the clerk of the county court in the town of Huntsville, county of Randolph, and State of Missouri, at such time as said officer shall appoint within twenty days from the date hereof; such deposition to be taken solely upon the interrogatories and cross-interrogatories attached to this stipulation, and when so taken may be used in evidence in the above-entitled cause on the trial thereof, subject only to objections as to the competency of all interrogatories and cross-interrogatories and the competency & relevancy of the answers thereto. The seal of said county court shall be sufficient evidence of the official character of said officer. The serving of notice and issuing of commission is hereby expressly waived.

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Witness our hands this thirtieth day of October, A. D. 1876.

CHUMASERO & CHADWICK,
Plaintiffs' Att'ys.

H. M. PORTER AND
WOOLFOLK & BULLARD,
Attorneys for defendant Henry T. Fort.

Deposition.

In the district court, 3rd judicial district, Lewis and Clarke County, Montana Territory.

GEO. ROUSH AND ELIZA ROUSH, PLAINTIFFS,
vs.
HENRY T. FORT ET AL., DEFENDANTS.

The said defendant Henry T. Fort, by his attorneys, Woolfolk & Bullard, and H. M. Porter, submits the following interrogatories to be answered by the said Henry T. Fort, as a witness, in taking his deposition to be used as testimony on behalf of said defendant Fort in this cause:

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Int. 1. State your name, age, and place of residence, and whether you are a party defendant to this suit.

Int. 2. State whether or not an agreement in writing was entered into between you and the plaintiffs in this action, on or about the 8th day of July, A. D. 1871.

Int. 3. State what you may know about the custody, care, and possession of the said written agreement between plaintiffs and yourself, dated about July 8th, 1871, since the execution of the same, and also as to where said agreement now is, and state what efforts you have made, if any, to find said original agreement, and to have the same produced in court on the trial of this cause.

Int. 4. State the contents of said written agreement made between plaintiffs and yourself on or about July 8, 1871.

Int. 5. State what the consideration was for the execution of said written agreement by plaintiffs.

Int. 6. State the amount of rents received by you for property turned over to you by plaintiffs under your agreement with them of July 8th, 1871, up to time of sale of said property.

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Int. 7. What disposition did you make of the amounts received by you for rents of the property so turned over to you by plaintiffs?

Int. 8. If any part of the rents so received was not credited on your judgment and decree against the plaintiffs, why was it not so done?

Int. 9. State whether you made any statement to any one as to whether it would be worth while or of any use for any one to bid for the property to be sold on 10th of November, A. D. 1871; if so, what did you state in regard to the matter?

Int. 10. State what amount of rent you have received, if any, for the property or any of it (so turned over to you) since the said 10th day of November, A. D. 1871.

166 Int. 11. State what use you have made, if any, of any part of the property so turned over to you by the pl'tffs in this suit since the 10th day of November, A. D. 1871, and what part of the said property purchased by you at said sale has been unoccupied since said purchase and how long it was so unoccupied.

Int. 12. State what was said between you and the plaintiffs in this suit, George & Eliza Roush, or either of them, about the time the order for the sale of the said property was issued under which it was sold November 10, 1871, in regard to the sale of said property or in regard to the plaintiffs' consent that said sale be made at that time.

Int. 13. State what you may know, if anything, in regard to the damage or destruction of the property purchased by you at said sale of November 10th, 1871.

WOOLFOLK & BULLARD, AND
H. M. PORTER,
Attorneys for Defendant Henry T. Fort.

Cross-interrogatories.

In the district court, county of Lewis and Clarke, third judicial district, Territory of Montana.

167 GEORGE ROUSH AND ELIZA ROUSH
vs.
HENRY T. FORT AND OTHERS.

Cross-interrogatories to be propounded to the above-named Henry T. Fort under the annexed stipulation.

Cross int. 1. If you state, upon your direct examination, that a written agreement was entered into between you and the above-named plaintiffs concerning certain rents, you will state who drew up such agreement, where the same was executed, to whom the same was delivered after execution, and who had the custody of the same.

Cross-int. 2. When did you last see the said agreement, and can you distinctly remember the contents thereof?

Cross-int. 3. Was not the consideration of said agreement on your part, or moving to you, that you were to collect and hold the rents and profits of the property, and also that the Roushes were to pay you two and one-half per cent. per month on the judgment?

168 Cross-int. 4. Was not the consideration moving to the Roushes from you an agreement on your part that you would cause said premises to be sold so long as you did receive such rents and profits?

Cross-int. 5. If, in answer to the 6th direct interrogatory, that you did collect the rents and profits of such property, you will state if a full accounting thereof between you and the plaintiffs was not had in said action upon a reference to one W. E. Cullen, master in chancery, and if you did not testify before him, and your evidence then and there reduced to writing, and also if you did not testify fully before the said Cullen as

to the disposition you made of the said receipts?

SANDERS AND CULLEN,
CHUMASERO & CHADWICK,
Plaintiff's Attorneys.

Deposition of witnesses produced, sworn, and examined on the 15th day of November, in the year of our Lord one thousand eight hundred and seventy-six, at the office of the clerk of the county court, in the town of Huntsville, in the county of Randolph and State of Missouri, before me, Charles Allen, clerk of the county court of the county of Randolph aforesaid, in a certain cause now depending in the district court of the third judicial district of the Territory of Montana, in and for the county of Lewis & Clarke, between Geo. Roush and Eliza Roush, his wife, plaintiffs, and Henry T. Fort, Frederick Reece, and Isaac W. Stoner, defendants, on the part of the defendants.

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HENRY T. FORT, of lawful age, being produced, sworn, and examined on the part of the defendant, deposeth and saith:

Answers to interrogatories put to defendant Fort.

Answer to 1st interrogatory. My name is Henry T. Fort; age, 60 years, and reside in Randolph County, Missouri; and I am one of the defendants in this action.

Answer to 2nd interrogatory. Plaintiff and myself made and signed a written agreement, dated July 8th, 1871, in regard to the sale of certain real property, situated in the town of Helena, Montana, on which I held a mortgage executed to me by the plaintiffs in this suit, and which mortgage had then been foreclosed by a decree of the district court of Lewis and Clarke County, Montana Territory.

Answer to 3rd interrogatory. I placed the said written agreement in the hands of Messrs Toole & Toole, who were then my attorneys in *in* this suit, about the time or some time after the commencement of this suit; and so far as I know they have had it ever since. It has never been returned to me. I have made dilligent search amongst my papers, where said agreement would have been had it been returned to me, and cannot find it; and I have no knowledge or information as to what disposition my said attorneys made of said paper. I have directed my present attorneys to call on said Toole & Toole for said paper and to search among the papers in this suit for said paper, and to inquire of the attorneys engaged in this suit for said paper.

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Answer to 4th interrogatory. The said written agreement between plaintiffs and myself, dated July 8th, 1871, contains the following provisions, to wit: That I should not sell the property included in my said mortgage and decree until after the 1st day of October, 1871, and plaintiffs, George and Eliza Roush, agreed to turn over to me all the rents of said property until the sale of said property. The said plaintiffs agreed to allow me two and one-half per cent. interest per month on the amount due me in said decree and on the amount of a judgment against them rendered in favor of Hartwell, which had been assigned to me, from the date of said agreement until said amounts should be paid. I was to credit the amount of the rents received by me on said judgments in payment of the interest and principal thereof, or on any other indebtedness I might hold against the said George and Eliza Roush or their property. These are all the provisions of said agreement as near as I can recollect.

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Answer to interrogatory 5th. The consideration for which the plaintiffs Roush's executed the agreement of July 8th, 1871, was that they should have further time on their indebtedness to me, in which their property might be disposed of more to their advantage than if sold at public sale. They requested me to postpone the sale on the terms named in the agreement, and I did so. The postponement of the sale was solely for the plaintiffs' accommodation.

Answer to 6th interrogatory. According to my books and memorandum and best recollection, I received rents on said property up to the time of the sale thereof, amounting to eight hundred and fifteen (815) dollars.

172 Answer to 7th interrogatory. According to my books, memorandums, and best recollection, I disposed of the rents received on said property up to the time of the sale of the same as follows: Interest on judgments I held against plaintiffs Roush's, two hundred and fifty & $\frac{70}{100}$; to redemption of the property included in my mortgage from sale for its taxes, one hundred and fifty-nine & $\frac{70}{100}$ dollars; to the payment of taxes on said property for the year 1871, eighty-four and $\frac{5}{100}$ dollars.

Answer to 8th interrogatory. I depended on my attorneys, Toole & Toole, to instruct me in all matters pertaining to rents of said property and disposition of the same, and as they neglected to instruct me in regard thereto, I thought it would do as well to settle with Roush and the sheriff, and account for the ballance of rents received on said property after sale, which I did immediately after the sale. I did nothing in the matter with intent to defraud plaintiffs. I kept them constantly advised as to what I was doing in collecting rents, and after the settlement with Roush, turned over to him all the accounts for rents I had not collected.

173 Answer to 9th interrogatory. I made no such statement to any one. I was anxious for the property to bring my debt. I wanted my money, not the property. I tried to influence every one I could to bid for the property, and run it up as high as possible.

Answer to 10th interrogatory. I have received but little rent for the property turned over to me on the 10th of November, 1871. I suppose about one hundred or one hundred and *and* ten dollars, and have expended more than that amount in putting new roof, new floor, and other repairs on the house on Main street previous to its being burned, and the payment of taxes on said property since the 10th of November, 1871.

Answer to 11th interrogatory. I have made no use of any of the property so turned over to me by plaintiffs in this suit since the 10th day of November, 1871, and all of it has been unoccupied most of the time since I purchased it at said sale, excepting a lot I sold to Wm. H. Allen, and I do not know how much of the time it has been occupied.

174 Answer to 12th interrogatory. I frequently talked with the plaintiffs, George and Eliza Roush, about the sale of the property a short time before, and about the time the order of sale was issued under which the property was sold. They said they could not raise the money to pay me, and I would have to sell the property, and this impression was strengthened by the continued and rapid decline in real property in Helena, Montana, for two or three years prior to that time; also, the great danger of destructive fire during the approaching winter, which had so frequently occurred in Helena, Montana; and, also, that there were two mechanics' liens for about four hundred dollars each, having priority over my mortgage; and, also, a top mortgage in favor of one Frederick Reece, which then amounted to about $600 or

$700; all on the property included in my said mortgage and decree; and the aforesaid mechanics' liens had been reduced to judgments in the district court of Lewis & Clarke County, Montana; under which judgments the property could have been sold at any time, and we thought the property could not possibly be sold to pay said debts & interest and taxes.

Answer to 13th interrogatory. None of the property purchased
175 by me at the sale of November 10th, 1871, was damaged in any way save the natural wear and tear, until the time of the fire that destroyed the International Hotel, Moore's livery stable, and other property on Main street; which fire burned the little house, owned by me, adjoining John Ming's property, and Capt. Parkinson's theatre, on Main street, Helena, Montana.

Answer to the interrogatories propounded by the plaintiffs:

Answer to 1st interrogatory. The said agreement between plaintiffs Roush's and myself was either drawn up by Massena Bullard, or it was a copy of one drawn up by him. The said agreement between plaintiffs and myself was executed on or about the 8th day of July, 1871, in Helena, Montana. According to my best recollection said agreement between plaintiffs and myself was delivered to Moses Moore after its execution, who kept it in his safe until after the sale of the property of the plaintiffs on the 10th day of Nov., 1871.

Answer to 2nd int. According to my best recollection, I saw
176 said agreement between plaintiffs and myself last when it was delivered to Messrs. Toole & Toole, who were then my attorneys, about the commencement of this suit. I can distinctly remember the contents of said agreement, for I read it often, and I have a brief of it in my account book, made at that time.

Answer to 3rd interrogatory. The conditions of said agreement between plaintiffs and myself on my part was that I would not sell their property until after the 1st day of October, 1871, and I was to collect the rents and profits of said property until the sale thereof, and the Roush's were to pay me two and one-half per cent. per month interest on said judgment; and also on a judgment assigned to me by Hartwell, until said judgments and interest as agreed upon should be paid.

Answer to 4th interrogatory. I do not know that I understand the question, but presume it should read that "you would not cause said property to be sold so long as you did receive such rents and profits." The word "not" having been omitted in your interrogatory. If that is the question asked, I answer, I did not make any such agreement, and it was expressly understood between us to the contrary.

177 Answer to 5th interrogatory. I cannot now remember that a full accounting between plaintiffs and myself before W. E. Cullen, master in chancery, was made. My recollection is that I did testify before the said master in chancery, but do not remember whether my evidence was reduced to writing or not, but presume it was; and I do not remember whether I testified fully before the said Cullen as to the disposition made of said receipts, but I know from my books and papers and best recollection that my evidence in answer to the direct interrogatories in reference thereto in this deposition are the facts in the case.

HENRY T. FORT.

STATE OF MISSOURI,
County of Randolph, set.:

I, Charles Allin, clerk of the county court within and for the county of Randolph, in the State of Missouri, do certify that in pursuance of the annexed stipulation, came before me at the office of the clerk of the county court, in the town of Huntsville, county of Randolph, and State of Missouri, Henry T. Fort, who was by me duly sworn to testify the whole truth of his knowledge touching the matter in controversy
178 aforesaid; that he was examined and his examination reduced to writing and subscribed by him in my presence at the place in that behalf first aforesaid; and his said deposition is now herewith returned.

And I further certify that said Henry T. Fort is a resident of Randolph County, in the State of Missouri.

In testimony whereof I have hereto set my hand and affixed my official seal at office in Huntsville, Mo., this 15th day of November, 1876.

[SEAL OF COUNTY CLERK.] CHARLES ALLIN,
Clerk County Court.

Testimony of FOX resumed.

Cross-examination:

Ques. Who made the improvements that were made upon the Roush building when occupied by Mr. Carr?

Answer. I employed a man to do the work, but have forgotten his name.

Ques. Have you any recollection of what these improvements were or the cost of the same other than what you obtain from the books of the bank?

Answer. I remember the cost from personal recollection.

179 Ques. Were these improvements all made by one man, and if so, by whom?

Answer. They were not. The roof and the sky-light were made by one man and the lights in the door were put in by another. Do not remember the names of the parties.

Ques. At what time were these improvements made?

Answer. According to the dates in our books, the date of putting lights in the door was June 9, 1873. The work on the roof, July 18th, 1873.

Ques. You have stated that you posted a notice for rent on the building; state the date and the contents of the notice.

Answer. I do not remember the date. It was after the building was vacated by Carr. The notice contained the words "for rent."

Ques. When Carr removed from this building where did he go?

Answer. I do not know.

Ques. In what business were you engaged and in what capacity during the years 1872, '3 and '4?

Answer. I was in the banking business. I was one of the managers of the bank of Fox, Lyster & Roe, and afterwards president of the Peoples' National Bank of Helena during that period.

180 Ques. Was dealing in real estate or renting a part of the business of the People's National Bank, or of Fox, Lyster & Roe, during these years?

(Defendant objects to the question as irrelevant.)

Answer. Fox, Lester & Roe dealt in real estate and rented property and collected rents for other parties. The People's National Bank collected rents for other parties, but did not deal in real estate.

Ques. State, if you know, what was the cost of the Roush building to erect it?

(Deft. objects.)

Answer. I do not know.

Ques. Was the Roush building worth as much in 1873 as it cost to build it?

Answer. In my judgment it was not.

Ques. What lessened its value?

Answer. Business leaving that locality.

Ques. How long did you continue to act as Mr. Fort's agent?

Answer. From May, 1873, to the present time.

Ques. To whom did Fort try to rent this property?

Answer. I remember his asking me to get him a tenant for it, and to send him any one wanting it. I know of no further efforts of Fort in trying to rent the property.

181 Ques. Were you present at the time Mr. Fort sold lots 16 & 17 in block 40 to Mr. Lyster?

Answer. I was not.

Ques. Have you any means of knowing what the consideration was other than the deed?

Answer. I think the draft which was remitted to Mr. Fort for the purchase money will show what the consideration was.

Ques. State all you know with reference to the rental value of the Roush building from November 10th, 1871, to Nov. 10th, 1872, if you know anything?

Answer. I know nothing of its rental value during that period, excepting for the months of July and August, for which I collected $20 per month.

GEO. W. FOX.

Defendant here offered in evidence an exhibit in writing, marked D, entitled "Notice," of which in words and figures the following is a copy, to wit:

In the district court, 3rd judicial district, Lewis and Clarke County, Montana Territory.

GEORGE ROUSH & ELIZA ROUSH, plaintiffs,
vs.
HENRY T. FORT ET AL., DEFENDANTS.

182 To the above-named plaintiffs, George Roush and Eliza Roush:

You are hereby notified that I neither have or claim any possession whatever of the property bid off by me at the sale made by the sheriff of Lewis and Clarke County, M. T., on the 10th day of November, A. D. 1871, under an order of sale issued upon a judgment and decree in said district court in my favor against you, the said property being lots 99 and 3 in block No. 20, & lots No. 7 & 16 & 17 in block No. 40 in the town of Helena, in said county; that said property is vacant, and that the possession thereof is not and has not been held or claimed by me or any other person since the sale under which I so bid off said lots was set aside, and proceedings had in that action.

WOOLFOLK & BULLARD and
H. W. PORTER,
Attorneys for Defendant.

SHERIFF'S OFFICE,
Lewis & Clarke County, M. T.

I hereby certify that I received the within notice on the 21st day of June, A. D. 1877, and personally served the same on the 21st day of June, A. D. 1877, upon George Roush and Eliza Roush, by deliv-
183 ering to each of said persons personally in the town of Helena, Lewis & Clarke County, Montana Terr'y, a copy of said notice.

J. C. WALKER, *Sheriff.*

Said notice dated the 21st day of June, 1877.

Defendant here offered in evidence the report of W. E. Cullen, master in chancery, in this cause; said report made an exhibit herein and marked E, to the introduction of which the plaintiffs, by counsel, objected; and which said report is in the words & figures follwing, to wit:

Master's report.

In the district court of the 3rd judicial district.

GEORGE ROUSH ET AL.
vs.
HENRY T. FORT ET AL.

This cause having been referred to the undersigned, a master in chancery of said court, by an order duly made and entered therein on the day of November, A. D. 1872, I have respectfully to report that, by agreement of parties, the said cause was brought on to be heard
184 before me at my office in Helena, M. T., on the 14th day of December, A. D. 1873, the parties to said action and their respective attorneys being present. The hearing of said cause not being completed on the said 14th of December, the same was continued from day to day, and was completed on the 17th of the same month. The testimony given by the witnesses upon such hearing was reduced to writing by myself, and is comprised in the 72 pages of testimony herewith returned as a part of this report. After duly considering said testimony and hearing the arguments of counsel thereon, I find the following to be the facts in said cause:

1st. That prior to the commencement of the sale complained of in plaintiff's' bill, the plaintiff, George Roush, gave to the officer making such sale directions as to the manner and order of making said sale, which were faithfully observed by the officer; but that, during the progress of the sale the said plaintiff requested the said sheriff to split up or divide a certain lot then about to be sold, and reserve from sale the rear portion of said lot, with which request the sheriff declined to comply.

185 2. That upon such sale the property brought reasonably fair prices.

3rd. That the defendants named in plaintiff s' bill were the purchasers thereof.

4. That prior to said sale, and on the 8th day of July, A. D. 1871, the plaintiffs and the defendant, Henry T. Fort, entered into an agreement in writing, whereby the said defendant agreed not to sell the said property until after the 1st day of October then next ensuing; in consideration whereof the said plaintiffs agreed to and did turn over to said defendant the rents, issues, and profits of said property, and agreed to allow the said defendant interest upon two certain judgments then held

by him, at the rate of two and one-half per cent. per month from the 1st day of July, 1871; that by the terms of said agreement the rents, issues, and profits of said property, after being collected by said defendant, were, at the end of each and every month, to be endorsed as a credit upon the aforesaid indebtedness as a payment of the interest and principal thereof, or any other indebtedness the said defendant may hold against the said plaintiffs or their property.

186 5. That in pursuance of said agreement the said defendant forbore to sell the said property until after the time agreed upon, to wit, until the 10th day of Nov., 1871, at which time the said sheriff's sale took place.

6. That by virtue of said agreement the said defendant, H. T. Fort, collected the sum of $815.00.

7. That he did not at the end of each and every month endorse upon the said indebtedness the amount collected by him, but that he applied a portion thereof to the payment of interest accruing under the terms of said agreement, a portion thereof to the redemption of said property from a tax sale at which he had purchased the same, and a portion thereof to the payment of the taxes upon the said property for the year A. D. 1871. The defendant Fort claimed two other items of credit as against the $815 collected by him, viz, a commission of 10 per cent. upon the amount collected for collecting the same, and the amount of a certain note against the plaintiff Geo. Roush, purchased by said defendant of one W. L. Steele, neither of which seem to your referee to be within the purview of the agreement mentioned in the 4th finding herein.

187 8. The said sale was made by virtue of two certain orders of sale, one issued upon a certain decree of this court in the case of Henry T. Fort vs. Geo. & Eliza Roush, made and entered therein on the 16th day of March, A. D. 1871, for the sum of two thousand eight hundred ninety-five and $\frac{90}{100}$ dollars, and costs; the other in favor of J. W. Hartwell et al., and against the said Geo. & Eliza Roush, made and entered on the 1st day of November, A. D. 1870, for the sum of two hundred and thirty-eight dollars, and costs, both of which said judgments or decrees were the property of said defendant Henry T. Fort.

9. That at the time of said sale there was due the said defendant H. T. Fort, upon said judgments, the sum of $3,055.79, and that he caused the said property to be advertised and sold to satisfy a sum greater than was then due him thereon, to wit, for the full sum for which said judgments were rendered, with interest thereon from the respective dates of their rendition. In illustration of this, the following account is submitted:

Judgment of H. T. Fort, damages	$2,895 90
Clerk's costs	37 60
Sheriff's do	6 70
Int. on same @ 10 % per an. from M'ch 16 to July 1, '71.	85 75
188 Hartwell judgment, damages	238 00
Clerk's costs	23 40
Sheriff's do	5 10
Costs in court below	30 45
Int. on same @ 10 % per an., from Nov. 1 to July 1, 8 mos..	19 78
	$3,342 68

Am't due July 1st, & am't due Oct. 1, '71, less am't of rents collected by Fort	$815 00	
Less int. on $3,342.68 @ 2½ % per mo., 3 mos	250 70	
Redemption of property from tax sale	159 79	
Taxes for 1871	84 05	
Bal'c' in Fort's hands Oct. 1, '71, to be applied on judgments		$320 46
Bal'c' due F. on both judgments Oct. 1, '71		$3,022 22
Int. on both judgments from Oct. 1, to Nov. 10, '71, at 10 % per annum, 1 mo. 10 days		33 57
Due F. on day of sale on both judgments		$3,055 79

10. That said property brought at said sale the sum of $3,400.00, and that the accruing costs of the sale was $236.45, leaving a balance in defendant Fort's hands due the plaintiffs of $107.76.

11. That in all other respects said sale was fairly and honestly conducted.

All of which is respectfully submitted.

W. E. CULLEN,
Master 3d Judicial District Court.

189 G. W. REED, being first duly sworn, testified as follows:

My name is Geo. W. Reed; my age, 40 years; my residence, Helena, M. T.; my occupation, a mechanic, or stone-mason. Have resided in Helena since 1869. I am acquainted with lot 7, in block 40, town of Helena, and have been since 1870. It was then in the possession of Mr. Roush. I remember the building being moved from said lot.

Ques. State as near as you can the value of the building when it was torn down or moved.

(Plaintiffs object.)

Answer. I should estimate the value of the building at that time to have been between $20 & $30.

Ques. State, if you know, whether said building had been occupied between the 10th day of Nov., 1871, and the time it was torn down or removed.

Answer. It had been occupied a portion of that time; I can't say what portion of the time it was occupied.

Ques. State whether or not, in your judgment, that house could have been rented constantly after the 10th day of November, 1871.

(Plaintiffs object.)

Answer. I think not.

Ques. Describe the house as fully as you can.

Answer. The size of the house, I think, was about 16x25 feet.

190 It was a board house; the boards were not dressed; they were placed upright and battoned. The front was square, with two windows and a door. The ceiling of the front room overhead was lined with muslin. The walls were papered.

Ques. State whether or not buildings in that locality have rented readily since November, 1871. And state fully all you may know on that subject.

Answer. I should say they have not, from the fact that buildings along there have been vacant for a greater portion of the time during that period.

Ques. State how other buildings you speak of in that locality compare with the said Roush building; whether they are better or worse.

(Plaintiffs object.)

Answer. I should say they were better.

Ques. State whether or not the said Roush building was so constructed and in such a state of repair as to make it desirable for tenants.

Answer. It was not.

Ques. State whether or not you are acquainted with lots on Fifth avenue, in the town of Helena, on the opposite side of the street from where Mr. Kleinschmidt & Doct. Steele reside, and known as the Roush lots.

191 Answer. I know the lots, and have known them since 1870. They are vacant lots.

Ques. State what, if anything, has been the rental value of the said lots since Nov. 10, 1871.

(Plaintiffs object.)

Answer. I do not think they have had any rental value since that time. Lots have been too cheap in Helena to have any ground rental value without buildings or improvements upon them or to rent to build on.

Ques. State whether or not in your opinion the lot on Rodney street from which said building was moved, could have been rented at a ground rent for the purpose of putting a building upon it?

(Plaintiffs object.)

Answer. I think not.

Ques. State whether you have or have not known of any lot in Helena being rented at a ground rent for the purpose of being built upon.

(Pl'ffs object.)

Answer. I have not.

Cross-examined:

Ques. When was the house on lot No. 7, in block 40, on Rodney street, built?

Answer. I don't know.

Ques. When was it torn down?

192 Answer. About 3 years ago, I think. I think Mr. Allen tore it down.

Ques. What would it have cost in 1874 to build such a house?

(Deft. objects to question as irrelevant.)

Answer. It would cost in the neighborhood of $150.00.

Ques. What was the height of this house?

Answer. I do not think it was over 8 feet.

Ques. What was the height of the square front?

Answer. In the neighborhood of 12 feet. Do not remember whether it was painted, but I think it was.

Ques. How many windows were there in this house?

Answer. Two in front; do not know whether there was one in the back or not. This building fronted to the east on Rodney street.

Ques. Do you know the building on Rodney street occupied as a butcher shop in 1874, and which adjoined the Roush building on th south side?

Answer. Yes. I do.

Ques. How did the heighth of the front of the building destroyed compare with the heighth of the front of the butcher shop?

193 Answer. I think the building destroyed might have been 18 inches or two feet higher than the butcher shop referred to.

Ques. What buildings in that immediate vicinity have been vacant the greater portion of the time since Nov. 10, 1871?

Answer. There have been several of them vacant. The Minnesota House, a portion of the Roush House on the corner, the butcher shop, the John Denn property, and other buildings in that locality.

Ques. Do you mean to swear that the house on the corner (now called the Dana House) has been vacant the greater portion of the time since Nov. 10, 1871?

Answer. I did not say so.

Ques. What house or building, if any, in that immediate vicinity has been vacant the greater portion of the time since Nov. 10, 1871?

Answer. There is a building there belonging to Mr. Blake that has been vacant a greater portion of the time.

Ques. How far was the Blake building from the one in controversy?

Answer. Probably 45 or 50 feet.

194 Ques. What was the Blake building worth in 1874?

(Defendant objects.)

Answer. About $25 or $30.

Ques. What is the Minnesota House worth?

(Defendant objects.)

Answer. $1,500 or $2,000, I should guess, but would not give that for it.

Ques. What was the butcher shop which adjoined the building destroyed, on the south, worth now?

(Defendant objects.)

Answer. It is worth now probably $35.00.

Ques. Have you ever bought or sold any buildings in that immediate vicinity.

(Defendant objects.)

Answer. I have. I bought a building in that vicinity in 1872, one block east from the building destroyed, down in Dry Gulch.

Ques. Was there any floor in the building destroyed; if so, state what you know about it?

Answer. There was a floor in it, but I never examined it. I never was in the house but once or twice. I went there to get some painting done, but did not pay much attention to it. I built a flue and plastered the house adjoining. I built flue in 1874 or in 1875. I done the plastering in 1875.

195 Ques. When you say that you know of no houses being erected upon rented ground in Helena, you do not intend to be understood to say that there are none in this place?

Answer. There are none that I know of, or to my knowledge. There may be some buildings in Helena that are on rented ground.

Ques. What was the next building on the north to the building destroyed?

Answer. It was a building known as Blake's market.

Ques. How did the building destroyed compare with Blake's market?

(Deft. objects.)

Answer. Blake's building is a large building. It has four rooms but about the same heig'th of the building destroyed.

GEORGE W. REED.

GEORGE ROUSH recalled by defendant:

Ques. State for what purpose you borrowed the money from Mr. Fort for which the mortgage from you to him was executed.

Answer. About one-half of the money was for the purpose of set-

tling up the debts; the other portion was to build a small brick house on lot No. 7 in block 40. I did not build the brick. I used the
196 money intended for that purpose in erecting the Dana House.

GEORGE ROUSH.

ISAAC MARCKS, sworn, & testified as follows, viz:

My name is Isaacs Marcks; my age is 38 years; reside in Helena, M. T. I have resided in Helena since the spring of 1866. From 1871 to 1873 I was doing business in the opera-house, adjoining the Roush building, on Main street. I was doing business there from the time of the fire in A. D. 1869, until August 4, 1873.

Ques. State what rent you paid for the use of the premises occupied by you from 1871 till Aug. 4, 1873.

(Plaintiffs object.)

Answer. I paid for the months of January, February, & March, 1871, $175.00 per month rent. For the month of April, 1871, I paid $50. I think that at this time my lease had expired. For May and June and up to December, 1871, I paid $55.00 per month. From December, 1871, forward, to February, 1873, I paid $55 per month. From February, 1873, until I vacated the premises, Aug. 4, 1873, I paid $40 per month.

197 Ques. What did you consider the premises occupied by you were worth per month during the period you occupied them from the fall of 1871?

(Plaintiffs object.)

Answer. It was hard to tell. I could make nothing. I run behind. I would not consider it worth anything for my business.

(Pl'ffs object to last answer.)

It is my impression that the owner of the premises I occupied offered to rent them to me at the time I left for $25.00 per month, but I would not swear to it.

(Plaintiffs objected to answer.)

Ques. State the reasons, if any, for your remaining in those premises from 1871 to 1873 at the rents you have stated.

(Pl'ffs object.)

Answer. Circumstances were such I could not help it. I had been trying to move away from there two years before I did.

Ques. What were these circumstances that prevented you from moving?

(Pl'ffs object.)

Answer. I was trying to secure another location of R. S. Hale. I could not make satisfactory arrangements with Mr. Hale. I was indebted to Mr. Parkinson some $200.00 back rent. The place I was trying to secure from Hale was on the opposite side of the street
198 from where I then was, and about 150 feet lower down the street. I staid there because I could not realize anything for the improvements I had put upon the premises. They cost me from one thousand to fifteen hundred dollars. I realized $75 for the improvements I left in the building. I did not care a cent, however, for the improvements.

The witness then proceeded to state in response to interrogatories:

I remember the Roush building.

Ques. What, in your opinion, was the rental value per month of the Roush building from the fall of 1871 until the 9th day of January, 1874?

Answer. I can only speak for myself. It had no value for my business. It was worth more in 1871 than in 1873. From Nov. 10, 1871, to Nov. 10, 1872, I think it was worth about $20 per month. From Nov.

10, 1872, to Nov. 10, 1873, it would be worth less than it was the year previous. From Nov. 10, 1873, to the fire January 9, 1874, I do not think it was worth anything for business purposes.

Ques. State, if you know, the character of the building on the Roush lots on Main street; &, if so, describe it.

(Pl'ffs object.)

199 Answer. I do. The building was 12½ feet wide. The upper part or the roof rested on the opera-house; the foundation was on posts, and no sills. The wall of the opera-house was the wall of the Roush building on the upper side. The wall of the opera-house was constructed of inch boards, stood upright without battons or studding on the inside. There was a board petition on the lower side of the building; the rear had one window, I beleive. The rear of the building was constructed of inch boards standing upright. The front of the building had four half sash doors. The building as a whole was a mere shell. The roof leaked badly. When Dusold occupied the building it leaked, but it did not leak at first. The roof was reshingled when Mr. Wolf occupied the premises, I beleive. A part of the building had settled. It did not stand level. The floor at the rear of the building was 6 or 8 feet from the ground. The rear part of the building between the floor and the ground was entirely open, and all the buildings from the corner of Bridge street to Ming's were in the same condition. It was extremely cold in winter. It was lined with cloth and papered. The ceiling was about 11 feet high.

200 Ques. State when the Langrishe troupe ceased to act in the theatre building.

(Pl'ffs object.)

Answer. I think they left about the fall of 1870.

Ques. State whether the theatre building was used after the fall of 1870 for theatrical purposes.

(Plaintiffs object.)

Answer. Yes, sir. It was so used up to the early part of 1871. After that time it was not so used, but was occasionally used for public meetings.

Ques. State what effect, if any, the closing of the theatre had upon the rental value of the buildings in that vicinity.

(Plaintiffs object.)

Answer. It had a great effect in depreciating the business in that locality. In 1872 the upper room in the opera-house was vacant. That was the only vacant room there in 1872. My place and 2 rooms above me were vacant from August, 1873, until the fire in Jan'y, 1874; and Billy Wentworth's building was vacant from some time late in the fall.

Ques. State what was the difference in the rental value for business purposes between the side of Main street on which the Roush building was situated and the opposite or east side, or the vicinity thereof.

(Plaintiffs object.)

201 Answer. I would as soon pay $150.00 for a building on the east side of the street as to pay $10 for a place on the west side.

Cross-examined:

The room occupied by me was the theatre saloon. My business depended in a great measure upon the theatre being open and the performances going on there. They quit performing regularly at the theatre in the fall of 1870, or some time in A. D. 1871, and afterwards the theatre was open occasionally. The reduction from $175 per month to $55.00, in the spring of 1871, was owing in a great measure to the theatre being

closed. At the time I left, in August, 1873, the theatre building was gradually settling, particularly the rear end, and became uncomfortable and dangerous for the purposes of a theatre and also dangerous for public meetings when held there. When I moved, I went to the north-east corner of Main and Wood streets, which was then one of the most central locations in town, particularly for my business, & the best stand in town for me. I leased this place for a term of two years, with some privileges, at a rental of $50 per month ground rent.

Ques. In your answer upon yesterday as to the comparative
202 value of the Roush building upon the west side of Main street, with the value of property on the east side of the street, did you refer to the Hale corner where you removed to, and its advantages for business, size, and business locality?

Answer. I did.

Ques. State if, in your estimate of the rental value of the Roush property, you meant to state what the same would be worth to you, or for the purpose of carrying on the business in which you were engaged.

Answer. I did; I cannot speak for others.

Redirect:

Ques. State whether in your opinion there was any material difference in the rental value of the lot occupied by you, rented from Hale, and the Floweree lot on the same side of the street.

(Plaintiffs object to the question for the reason that it is not proper redirect examination; objection overruled.)

Answer. I consider that there was some difference. The Hale lot occupied by me had a greater rental value than the Floweree lot.

I. MARKS.

ROBERT CARR recalled in chief:

203 After I left the Roush building on Main street, about the 25th of September, I went by there frequently and it was vacant; I think I saw a notice for sale or rent on the building a week or two after I left it. There were other vacant buildings there, one on each side of the Roush building, at the time I left, and all the buildings up to the corner of Bridge street were vacant, with the exception of Blake's butcher shop. Most of the buildings from the Roush building up to the corner of Bridge street were vacant during the time I was there. It was about 100 feet from the Roush building to the corner of Bridge street. To the best of my recollection these buildings remained vacant up to the fire, Jan'y 9, 1874, including the Roush building.

GEO. F. MARSH was duly sworn, & testified as follows:

My occupation is surveyor and draughtsman.

Ques. Do you know lots 16 & 17, block 40, situated on Fifth avenue, opposite the residence of Doct. Steele and T. H. Kleinschmidt, and adjoining lot upon which the stone foundation remains?

Answer. I do.

Ques. What is their condition as to being eligible lots for any particular business or residence, & what particular streets or squares do they front on?

204 (Defendant objects to the question for the reason that the same matter has been gone into in chief by plaintiffs. Objection overruled & excepted to by defendants.)

Answer. I consider their location for business or residence to be among the best in Helena, for the reason that they have two frontages,

one facing Fifth avenue on the north and the greater portion of the other facing the public square on the south.

Ques. What in your judgment, from Nov. 10, 1871, to February 5, 1876, would be the rental value of these two lots per month?

(Objected to by defendant for the same reason as given to preceding question. Objection overruled and ruling excepted to.)

Answer. I would consider that $10 per month would be a reasonable ground rent.

Cross-examined:

Ques. State if there are not other vacant lots adjoining lots 16 & 17, block 40.

Answer. There are and have been vacant some time.

Ques. Do you know of there being any application to rent these lots?

Answer. I do not know of any application having been made for that purpose.

205 Ques. Do you know of any lots off of Main street, in Helena, having been rented for building or other purposes?

Answer. No, sir.

GEORGE F. MARSH.

OWEN MCCANN sworn, & testified as follows:

I reside in Helena, M. T. My age, 39 years; occupation, a miner; I have resided in Helena off and on for eleven years.

Ques. Are you acquainted with property on Rodney street, in Helena, and its value?

(Defendant objects to the question for the reason that the same matter was gone into in chief fully. Objection overruled & excepted to by def't, Fort.)

Answer. I am not acquainted generally with property on that street or its value. I own a house and lot on that street opposite Blake's butcher shop, about 150 feet from the Dana House. My house is 30 feet front by 40 feet deep. It is divided into 2 parts; one part for a store room and the other part for dwelling purposes. I keep the premises for rent. I have owned them since the summer of 1875. Prior to the summer of 1875 my premises were rented.

206 (Defendant objects to the foregoing answers as being irrelevant and immaterial.)

Ques. Do you know the building adjoining the Dana House, torn down by Allen?

Answer. I do not.

Ques. How continuously was your building occupied from 1871 to 1876?

(Defendant objects to the question. Objection overruled, and ruling excepted to by def'ts.)

Answer. It was occupied all the time, until the last year.

OWEN J. MCCANN.

J. F. TAYLOR sworn, & testified as follows, to wit:

My name is Jesse F. Taylor. My age is 49 years. My residence is Helena, M. T. My occupation, tax gatherer.

Ques. State, if you know, the amount of taxes paid on lots 99 and 3, in block 20, and on lots 7, 16 and 17, in block 40, in the town of Helena, since the year 1871.

Answer. In 1871 and '2 the lots were not assessed to Fort. In 1873 the half of lot 3, block 20, and lots 16 and 17, block 40, valued at $900;

assessment, 23 mills; $20.70 taxes paid. In 1874 half of lot 3,
207 block 20, valued at $400; assessment, 23 mills; $9.20 taxes paid.
In 1875 lot 3, block 20, valued at $400; assessment, 29 mills; $11.60 tax paid. In 1876 lot , block 20 (objected to by plaintiffs), valuation, $100.00; assessment, 25 mills; $2.50 taxes paid.
(Plaintiffs move to strike out all the evidence of Mr. Taylor, for the reason that it is not embraced in the order of reference.)

J. F. TAYLOR.

JAMES MCEVILY, recalled by defendants:

Question. State, as nearly as you can, at what time you ceased to occupy the premises known as the Roush building, on Main street.

Answer. Sometime in the spring or early in the summer of 1872.

Ques. State where you moved to after you left the Roush building.

(Plaintiffs object.)

Answer. To John Ming's building, on the same side of the street, two doors further down. O'Toole stopped with me in both buildings.

Ques. How long did you occupy the Roush building after the election at which Toole and Clagget were candidates for delegate to Congress?

Answer. I think about six weeks or two months.

Cross-examined:

208 Ques. What rent did you pay for the Ming building, to which you moved?

(Defendant objects.)

Answer. Sixty dollars per month.

Ques. What was the condition of Roush building at the time you occupied it, as to skylight?

(Defendant objects.)

Answer. There was a skylight in the back room.

Ques. What was the condition of the rear of the Roush building, so far as relates to the cellar or the vacant space before mentioned?

(Def't objects.)

Answer. There was no cellar; the space mentioned was enclosed.

Ques. State if, since giving your testimony above, you have ascertained the exact time you left the Roush building and took possession of the Ming building; and, if so, what was it?

Answer. I took possession of the Ming building October 31, 1871. I quit the Roush building a few weeks before I took possession of the Ming building. I found this upon examination of receipts & memorandums, after giving the foregoing testimony.

Question by plaintiffs:

Ques. Do you testify to these dates from memory *of* from memorandums?

209 Answer. I testify from my own memory, aided by memorandums furnished me by Mr. C. K. Wells.

JAMES McEVILY.

That thereupon, on said 30th day of June, A. D. 1877, the said defendant Fort filed his exceptions to the report of the referee, notice and copy of such exceptions being then and there waived in open court by the attorneys for plaintiffs; which said exceptions to the report are in words and figures as follows, to wit:

Exceptions to report of referee.

In the district court, 3rd judicial district, Lewis & Clarke County, Montana Territory.

GEO. ROUSH & ELIZA ROUSH, PLAINTIFFS,
vs.
HENRY T. FORT ET AL., DEFENDANTS.

To the report of the referee, bearing date June 30th, 1877, and to the decision of the issues in this cause contained therein, the defendant Henry T. Fort excepts as follows:

First. For that the value of the use and occupation of lots 3 & 99, in block 20, in the town of Helena, from the 10th Nov., 1871, to Nov. 10, 1872, was found by the said referee to be seventy-five dollars per month, amounting to $900, while the evidence shows that said lots for
210 said time were not worth more than twenty dollars per month.

Second. For that said referee found the value of the use and occupation of said lots, Nos. 3 and 99, from Nov. 10, 1872, to Nov. 10, 1873, to be sixty dollars per month, amounting to $720.00, which the evidence shows the value of the use and occupation of said lots during said time to be not more than twenty dollars per month for a part of said time, and not more than twelve dollars and 50 cents for a part of said time; and that during a part of said time the said premises could not be rented for anything.

Third. For that said referee found the value of the use and occupation of said lots 3 and 99, from the 10th day of November, 1873, till the 9th day of January, 1874, to be fifty dollars per month, while the evidence shows that said premises, during said time, could not be rented for any price, and had no rental value during said time.

Fourth. For that said referee found the value of the use and occupation of said lots from January 9th, 1874, till Feb'y 5th, 1876, to be twenty-five dollars per month, while the evidence shows that during said time the use and occupation of said lots was of no value whatever

211 Fifth. For that the said referee found the value of the use and occupation of lot No. 7, in block 40, to be six dollars per month from November 10, 1871, to February 5th, 1876, while the evidence shows that during the greater portion of said time said premises had no rental value and could not have been rented for any price.

Sixth. For that the said referee found the value of the use and occupation of lots No. 16 and 17 in block 40 from Nov. 10th, 1871, to February 5th, 1876, to be ten dollars per month, while the evidence shows that the value of the use and occupation of said premises during said time was nothing whatever, that said lots were vacant and unimproved, and had no rental value whatever.

Seventh. For that the referee did not find the amount of rents rereived by defendant Fort for the property mentioned in his report as requested by the order of reference.

Eighth. For that the referee did not find what amount of rents defendant Fort could have or might have received for said property.

Ninth. For that the amounts found by the referee as the value
212 of the lots not rented by defendant Fort to be as follows, to wit: on lots 16 and 17 in block 40 to be $528.58; and on lots 3 and 99 in block 20 from the 9th day of January, 1874, till the 5th day of February, 1876, to be $621.58 (the evidence shows said lots 3 and 99 were not rented during said time), thus making an aggregate of $1,150.16;

while the amended and supplemental complaint of plaintiffs alleges the value of the use and occupation of the property purchased by defendant Fort, and which he did not rent from the time of the sale until the filing of said complaint, is five hundred dollars.

Tenth. For that the referee permitted evidence in rebuttal to be introduced by plaintiffs not in rebuttal of the evidence of defendant, and which was not proper evidence in rebuttal.

Eleventh. The referee admitted improper evidence on the part of the plaintiffs against the objections of defendant as is shown by the testimony reported by the referee in the case. The referee did not find the damage done to the property by inevitable accident separate from other damages done to the property.

Twelfth. The findings of the referee are against the evidence
213 and not sustained by the evidence reported by the referee, and are not responsive to the issues submitted by the court to the referee.

WOOLFOLK and BULLARD and
H. M. PORTER,
Attorneys for Defendant Fort.

That on said 30th day of June, A. D. 1877, the said defendant Fort filed his motion for a new trial herein, notice of which said motion and copies hereof were at the time waived in open court by Hon. D. S. Wade, the judge thereof, and also the attorneys for plaintiffs; which said motion was in words and figures as follows, to wit:

Motion for a new trial.

In the territorial dist. court—3rd judicial district, Lewis and Clark County, Montana Territory.

GEO. & ELIZA ROUSH, PLAINTIFFS,
vs.
HENRY T. FORT ET AL., DEFEND'TS.

Now comes the above defendant, Henry F. Fort, by his attorneys, H. M. Porter, Woolfolk & Bullard, and moves the honorable court for
214 a new trial of said cause for the following reasons, to wit:

First. Irregularity in the proceedings of the court and in the orders thereof and abuse of discretion, by which the defendant was prevented from having a fair trial, in this, to wit:

1. The court erred in refusing to permit defendant to strike from the files or demur to the amended and supplemental complaint of plaintiffs, and in only permitting an answer thereto.

2. The court erred in taking up motion of plaintiffs' attorneys to strike out the parts of defendant's answer asking for a revival of his judgment against the plaintiffs without allowing the time prescribed by the rules of the court before taking up said motion.

3. The court erred in referring this cause against the exceptions of defendant.

4. The court erred in prescribing a time for the referee to report, so short that the referee had no opportunity to fully investigate the evidence or do substantial justice between the parties.

5. The court erred in directing the referee to find upon the four propositions submitted to him.

215 *a.* The defendant Fort could not be justly held responsible for

any indebtedness found to be due Roush as appears from the report of W. E. Cullen, referee; such indebtedness only arose from the purchase of Fort of the property mentioned in report, and after the sale had been set aside, such indebtedness no longer existed.

b. The defendant Fort could not legally be charged as for the occupancy of the house and vacant lots purchased by him at sheriff's sale, but only for such due and proper diligence in renting the same as owners usually exercise.

6th. The court erred in refusing to permit defendants' attorneys to file amendment marked Exhibit A to their answer.

6th. The court erred in refusing to permit defendants' attorneys to file amended answer marked Exhibit B.

Second. Insufficiency of the evidence to justify the decision of the referee, and that it is against law, in this, to wit

(*a.*) The referee finds that the frame building on lots 3 and 99, block 20, from Nov. 10, 1871, to Nov. 10, 1872, was $75 per month,
216 when the evidence of Carr, Fox, agent of Fort, and T. T. Williams shows that defendant Fort was only getting $20 per month for it at that time and that he could not get more, and that he dealt with the property as his own and did the best he could with it, and there was no evidence whatever showing that Fort was guilty of any negligence in its management. The preponderance of the evidence shows that the property was worth no more than $20.00 per month at this time.

(*b.*) The referee finds that from Nov. 10, 1872, to Nov. 10, 1873, the said property was worth $60 per month, and $50 per month thereafter, until destroyed by fire, against almost the entire evidence. The evidence of Carr and Fox, agent, shows that during this period the rent was necessarily reduced from $20 to $12.50 per month, in order to retain the tenant, and that from September, 1873, no tenant could be obtained at any price; that there was no application for the property after Carr left, although notice to rent was placed on the property. There is no evidence to sustain such finding of the referee.

(*c.*) The referee also finds that the vacant lots (99 and 3), after
217 the fire, from Jan'y 9, 1874, to Feb'y 6, '76, were worth $25 per month, when the evidence shows that such vacant lot had no rental value after the fire; that lots for about 300 feet from Main street to the head of Bridge street, embracing also these Roush lots, have remained vacant since the fire of Jan'y 9, 1874, and that there is no demand for said lots for building or other purposes.

(*d.*) The referee also found that lots 16 and 17, block 40, on Fifth avenue, had a rental value of $10 per month, when there was but little evidence, if any, that property outside of Main street had any rental value whatever, but there was overwhelming evidence to the contrary. Mr. Kinna, the only witness in chief who testified to the rental value of lots 16 & 17, has himself a lot adjoining the Roush property that the evidence shows has been vacant since the year A. D. 1871.

(*e.*) The referee also found that lot 7, block 40, had a rental value of $6 per month, which was largely against the weight of the evidence.

(*f.*) The finding of the referee is also far beyond the account charged and claimed in the supplemental complaint. Said complaint, for example, only charges Fort with $500 on account of property not rented but used by him, while the referee finds the value of the use
218 of the vacant lots on Main street, and the vacant lots 16 and 17, block 40, on Fifth avenue, and lot 7, block 40, on Rodney street,

were worth in the aggregate $1,456.36, nearly $1,000 more than claimed by plaintiffs in their amended complaint.

(*g.*) It has been held by the court in this case that the findings of W. E. Cullen, esq., former referee herein, were res adjudicata. He found that the property sold at sheriff's sale brought reasonably fair prices. Fort purchased the property sold to him for $1,600.00. The referee finds that a house, the only improvement of any value on the property purchased by Fort, as shown by the pleadings and evidence, *were* destroyed by fire on the 9th day of January, 1874, and that said house was of the value of $1,150.00. That the only other improvements on the property was a part of a house on lot 7, worth, as found by the referee, $50, and removed from the property, premises. That, notwithstanding this destruction and removal of the improvements, the referee finds the rental value of the vacant lots from Nov. 10, 1871, to Feb'y 5, 1876, less than 4 years and three months, amounted to the sum of $3,175.36, lacking but $25.00 of being double what all the property sold for at sheriff's sale, with all the improvements thereon.

219 Third. The referee failed to find the amount of rent actually received by defendant Fort, or what he should have received as directed by the court.

Fourth. The referee erred in admitting improper evidence-in-chief and on rebuttal, as is shown in the testimony taken and excepted to at the time.

H. M. PORTER,
WOOLFOLK & BULLARD,
Attorneys for Defendant Fort.

That thereupon the court made the following decision, to wit:

Decision upon exceptions to referee's report & mo. for new trial.

In 3d judicial district, Lewis and Clarke County.

GEORGE & ELIZA ROUSH, PLAINTIFFS,
vs.
HENRY T. FORT, DEFENDANT.

This cause having been argued and submitted upon exceptions to the report of the referee herein by the defendant, and his motion for a new trial, the court makes the following decision upon such exceptions and motion:

In determining the preliminary motions in the case, the court
220 has heretofore decided that all the matters contained in the report of W. E. Cullen, as master in chancery, in the action to set aside the sale, were res adjudicata, and could not be again tried in this action. The supreme court so treated such master's report, and based the judgment of reversal upon the truth of what that report contained. That report shows that of $815.00 in rents received by Fort, as the trustee of Roush, he misapplied and converted to his own use about $350.00 thereof. It was a mere matter of computation for the referee herein to have ascertained that fact. About $250 of this sum was allowed to Fort as costs in the case, but, as the sale was set aside as to Fort, he should not have been credited with the costs; but, leaving the costs as charged in the master's report, there is $107.76 in the hands of Fort belonging to plaintiffs, together with interest thereon from the

time the same was so wrongfully received by Fort. The amount, as found by the referee, principal and interest, is $168.51, and is correct.

As to the findings of the referee upon the testimony taken and reduced to writing by him, such findings are, I suppose, for the purposes of exceptions thereto, or motion for a new trial, to be treated as
221 the verdict of a jury, and that if there is testimony to support such findings, they cannot be disturbed by the court. The referee was directed, among other things, to ascertain from the evidence the value of the rents of the property purchased by Fort at the sheriff's sale on the 10th day of November, 1871, to the 5th day of February, 1876, when the sale was set aside, charging Fort as for the use and occupation of the property for such period. The theory of such direction to the referee was that this sale had been set aside because of the fraudulent practices of Fort in and about procuring the sale to take place; and, if so, that he should be charged as for the use and occupation of such property during the period he held possession thereof by virtue of the fraudulent sale. The referee finds that the rents of lots 3 and 99, block 20, on upper Main street, upon which there was a store building, for the period named, amount to $1,720.00. There is testimony to support this finding, and though the amount is larger than I should have found under the testimony, yet there is testimony fairly to support the finding, and it cannot, therefore, be disturbed. Treating the finding as a verdict, the court will not inquire into the conflicting evidence
222 to see where the weight thereof preponderates, but will only inquire if there is testimony to support the finding.

There is also testimony to support the finding as to the value of the house on lot 7, block 40, torn down by Allen, valued at $50.00.

The finding of the referee as to the rental value of the vacant lots are based upon testimony entirely speculative in its character, and is not such testimony as ought to furnish the foundation of a judgment. And though the defendant ought to be charged as for the use and occupation of such vacant lots, if such use and occupation could have been of no value to the plaintiffs, then the defendant ought not to be charged with any rents for the use of such property. And there is no testimony to show that Roush could have received one dollar for the use of the vacant lots while they were in the possession of Fort. The witnesses proceed upon the supposition that if these lots could have been rented they would have been valuable. Some of them think the lots might have been rented for a term of years. But this is guesswork. They give no facts upon which they base their judgment. Their opin-
223 ions are clearly mere speculations, and do not furnish the material upon which judgments ought to be rendered. The court, therefore, overrules the exceptions and confirms the report as to the items and findings of $168.51, balance found in hands of Fort; and as to the finding of $1,720.00, rental value of lots 3 and 99, block 20, and as to the finding of $50, value of the building torn down by Allen, in all, $1.938.51, from which should be deducted $58.20 for repairs, and $44.00 for taxes paid by Fort, leaving $1,836.31 (eighteen hundred thirty-six & $\frac{31}{100}$ dollars), and sustains the exceptions to the findings as to the use and occupation of the vacant lots.

It is, therefore, ordered that judgment be entered upon the referee's report in favor of the plaintiffs and against the defendant Fort, for the sum of eighteen hundred and thirty-six and $\frac{31}{100}$ dollars, and costs of this action. The motion for a new trial is overruled.

To the order sustaining exceptions to report of referee, plaintiffs at the time duly excepted.

To the order overruling exceptions to report, to the entry of judgment thereon in favor of plaintiffs, and to the order overruling motion
224 for a new trial, defendant at the time duly excepted.

Ordered, that proceedings on judgment be stayed for 30 days from June 30th, to enable either party to perfect appeal; during which time either party may prepare a bill of exceptions in vacation to be signed nunc pro tunc.

June 30, 1877.

D. S. WADE, *Judge.*

The court then overruled the said defendant Fort's said objections to the said report and findings of said referee to the extent and as stated in said decision, and also overruled said defendant Fort's said motion to set aside said findings and for a new trial, and rendered judgment upon the report and findings of said referee in favor of plaintiffs and against defendant Fort, in the sum of $1,836.31; to which action of the court in overruling said defendant's motion to set aside said findings of the referee and for a new trial, and in overruling defendant's objections to said report and findings of said referee, and in rendering judgment for the sum aforesaid, the defendant Fort at the time duly excepted, and asks that this his bill of exceptions be signed, sealed, and
225 made a part of the records in this action; which is done accordingly this 27th day of July, A. D. 1877.

D. S. WADE, *Judge.*

And thereupon, on the 30th day of June, A. D. 1877, judgment was duly entered in said cause in words and figures following, to wit:

Judgment.

In 3rd judicial district court, Lewis and Clarke County, Montana Territory.

GEORGE ROUSH AND ELIZA ROUSH
vs.
HENRY T. FORT.

This action came on regularly for trial, and the same having been referred to I. R. Alden, esq., referee, to hear the testimony and make his report herein, and the said referee having heard the evidence of the respective parties and having reported the same with his finding thereon to the court, and the court having considered the said report of the said referee and having heard the arguments of counsel of the respective parties, confirmed the report of said referee as to the sum of eighteen hundred and thirty-six dollars and thirty-one cents; wherefore,
226 by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that said plaintiffs have and recover from said defendant the sum of one thousand eight hundred and thirty-six dollars and thirty-one cents, with interest thereon at the rate of ten per cent. per annum from the 30th day of June, 1877, until paid, together with said plaintiff's costs and disbursements incurred in this action, taxed at the sum of three hundred & forty-three dollars and fifty cents.

And afterwards, to wit, on the 28th day of July, A. D. 1877, the said defendant Fort filed herein his notice of appeal in words & figures following, to wit:

Notice of appeal.

In the Territorial district court, 3rd judicial district, Lewis and Clarke County, Montana Territory.

GEO. & ELIZA ROUSH, PLAINTIFFS,
vs.
HENRY T. FORT, FREDERICK REECE, & I. W. Stoner, defendants.

Please take notice that Henry T. Fort, one of the defendants in
227 the above entitled action, hereby appeals to the supreme court of this Territory from the judgment therein made and entered in the said district court on the 30th day of July, A. D. 1877, in favor of plaintiffs in said action and against said defendant, and the whole thereof, and from the order overruling the motion of defendant for new trial, and all the orders in said cause, and from the whole thereof.

WOOLFOLK, PORTER & BULLARD,
Att'ys for Defendant Fort.

HELENA, *July 28th*, 1877.

To the clerk of said district court & Messrs Sanders & Cullen & Chumasero & Chadwick, attorneys for plaintiffs:

Service of copy of the above notice received this July 28th, 1877.

SANDERS AND CULLEN,
Att'ys for Plaintiffs.

And thereafter, on the same day, to wit, July 28th, A. D. 1877, the said defendant, Henry T. Fort, filed herein in said cause, his undertaking on appeal, of which in words & figures the following is a copy, to wit:

228 *Bond on appeal.*

In the territorial district court, 3rd judicial district Lewis and Clarke County, Montana Territory.

GEORGE ROUSH & ELIZA ROUSH, PLAINTIFFS,
vs.
HENRY T. FORT, FREDERICK REECE, & ISAAC W. Stoner, defendants.

Whereas Henry T. Fort, one of the defendants in the above action, has appealed to the supreme court of the Territory of Montana from a judgment made and entered against him in said action, in said district court, in favor of the plaintiffs in said action, on the 30th day of June, A. D. 1877, for the sum of eighteen hundred and thirty-six $\frac{31}{100}$ dollars damages, and three hundred & forty-three $\frac{50}{100}$ dollars costs of suit:

Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned Geo. W. Fox, a resident of the town of Helena, county and Territory aforesaid, and by occupation a banker, and Albert G. Clarke, also a resident of said town, county, and Territory, and hardware merchant by occupation, do hereby jointly and severally undertake and promise on the part of the appellant, that the said
229 appellant will prosecute his appeal with effect, and will pay all damages and costs which may be awarded against him on the

dismissal or trial of said appeal not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

And whereas the appellant is desirous of staying the execution of the said judgment so appealed from, we do further, in consideration thereof, and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further, jointly and severally, bound in the further sum of five thousand dollars, being double the amount named in the said judgment; that if the said judgment appealed from, or any part thereof, be affirmed, the appellant shall pay the amount directed to be paid thereby, or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellant upon the appeal.

Witness our hands & seals this 28th day of July, A. D. 1877.

GEO. W. FOX. [SEAL.]
A. G. CLARKE. [SEAL.]

TERRITORY OF MONTANA,
County of Lewis & Clarke:

230 George W. Fox and Albert G. Clarke, being first duly sworn, depose and say that they are the sureties in the foregoing undertaking, and that they are each worth the amount of five thousand dollars specified in said undertaking over and above all their just debts and liabilities, exclusive of property exempt from execution.

GEO. W. FOX.
A. G. CLARKE.

Subscribed and sworn to before me this 28th day of July, A. D. 1877.

ALEX. H. BEATTIE, *Clerk.*

231 In district court, 3rd judicial district, Montana Territory, Lewis & Clarke County.

GEO. & ELIZA ROUSH
vs.
HENRY T. FORT ET AL.

I, A. H. Beattie, clerk of said district court, do hereby certify that the foregoing two hundred and thirty pages, numbered from 1 to 230, inclusive, contain a full, true, and correct transcript of certain pleadings, records, and proceedings had, made, and done in said court in the above entitled cause, as the same appear on file and of record in my office.

In testimony whereof I have hereunto set my hand & affixed my official seal, this 6th day of August, A. D. 1877.

[SEAL DIS'T COURT, 3D JUD. DIS.] ALEX. H. BEATTIE, *Clerk.*

Filed in the office of the clerk of the supreme court of the Territory of Montana, this day of August, A. D. 1877.

I. R. ALDEN, *Clerk.*

232 In the supreme court of Montana Territory, January term, A. D. 1878.

GEORGE ROUSH AND ELIZA ROUSH, PLAINTIFFS and respondents,
vs.
HENRY T. FORT, DEFENDANT AND APPELLANT.

Be it remembered that in the present term of January, in the year of

our Lord one thousand eight hundred and seventy eight, the above-entitled cause was brought into said supreme court by virtue of an appeal from the judgment and order overruling defendant Fort's exceptions to the report of the referee and motion for a new trial herein made and entered on the 30th day of June, A. D. 1877, in the district court of the 3rd judicial district of said Territory in and for Lewis and Clarke County, agreeably to the statute of said Territory and the rules of said supreme court in such case made and provided, and the transcript of the record of said district court in said cause was duly filed herein.

And afterwards, to wit, on the 7th day of January, A. D. 1878, the said appellant filed herein his suggestion of diminution of the record herein in the words following, viz:

233 In the supreme court of Montana Territory, January term, A. D. 1878.

ELIZA ROUSH ET AL., RESPONDENTS,
vs.
HENRY T. FORT ET AL., APPELLANTS.

Now comes the defendant, Henry T. Fort, and suggests a diminution of the record in the above cause and moves the honorable court for an order on the clerk of the district court of the third judicial district to certify to this court the original complaint and amendments thereto; also the answer of defendant and the remittitur from the supreme court.

(Signed) WOOLFOLK AND PORTER,
Att'ys for Def't, Fort, and Appellant.

(Endorsed:) Filed Jan'y 7, '78. (Signed) I. R. Alden, clerk.

234 (Omitted.—Attest: I. R. ALDEN, *Clerk.*)

235 (Omitted.—Attest: I. R. ALDEN, *Clerk.*)

236 And on the 9th day of January, A. D. 1878, the said cause coming on to be heard before the court upon appellant suggestion of a diminution of the record herein, the court made, signed, and caused to be entered of record an order to correct the transcript in this cause, in conformity to the said suggestion, which said order was in the words and figures following, to wit:

In the supreme court, Territory of Montana, January term, A. D. 1878.

ELIZA ROUSH ET AL., PLAINTIFFS & RESPONDENTS,
vs.
HENRY T. FORT ET AL., DEFENDANTS AND APPELLANTS.

Upon the suggestion in writing of the appellant, H. T. Fort, of a diminution of the record of the above-entitled cause in the following particulars, to wit, that the original complaint and amendments thereto; also the answer of defendant to such complaint as amended, and the remittitur of the supreme court herein have been omitted from the transcript on appeal. It is ordered that the clerk of the district court
237 of the 3rd judicial district, Montana Territory, do certify forth-

with to this court, copies of all the foregoing pleadings and proceedings.

(Signed) D. S. WADE,
Chief Justice.
HIRAM KNOWLES,
Asso. Justice.
HENRY N. BLAKE,
Asso. Justice.

(Endorsed:) Eliza Roush et al., respondents, vs. Henry T. Fort et al., appellants. Order. Filed and entered Jan'y 9, 1878. I. R. Alden, clerk.

238 (Omitted.—Attest: I. R. ALDEN, *Clerk.*

239 (Omitted.—Attest: I. R. ALDEN, *Clerk.*

240 (Omitted.—Attest: I. R. ALDEN, *Clerk.*

241 And afterwards, to wit, on the 16th day of January, A. D. 1878, the said appellant, Henry T. Fort, by his attorneys of record, Messrs. Woolfolk and Porter, filed in said cause his brief of points and authorities relied upon on the appeal, of which in words and figures the following is a copy, to wit:

Brief of appellant.

In the supreme court of the Territory of Montana, January term thereof, A. D. 1878.

GEO. AND ELIZA ROUSH, RESPONDENTS,
vs.
HENRY T. FORT, APPELLANT.

First. The original action was against Fort, Reece, and Stoner to set aside the sale under which the property of plaintiffs had been purchased by them. The sale was affirmed as to Reece and Stoner and set aside as to the property purchased by Fort, on account of his being the judgment creditor; and that he had failed to credit the execution with the entire amount received by him and sold the property for $107.76 more than was sufficient to pay his debt and costs.

Second. After the reversal of the case in the supreme court as
242 to Fort, the plaintiffs filed an amended and supplemental complaint against Fort, and seeking to hold him not only to account as trustee for the rents and profits actually received by him from such property as he had purchased under his decree, but to charge him with imaginary rents, as probable profits, which he did not receive, but which he might, under favorable circumstances, possibly have received. No copy of this amended and supplemental complaint was served, as required by law, upon the defendant nor upon any attorney for him as required by law. The defendant having no attorney, should himself have been served. (Cod. Stats., page 38, sect. 53; 23d California, page 128; 30 Cal., page 192.) The court had no right to require the defendant to answer until he had been brought into court in the manner provided by law. The law treats such amendment as virtually a new action, and requires the service of a copy thereof, before defendant is in court for further proceedings.

Third. The court therefore erred in requiring defendant Fort to answer to the merits, and in refusing to permit him to file a mo-
243 tion to strike the said amended and supplemental complaint from the files. (See exception F, record, pages 16, 17, and 18.)

Fourth. The amended and supplemental complaint changed entirely the nature of the original action, which was to set aside the sale to defendants, Reece, and Stoner, and Fort, and converted into an action against Fort alone, seeking to charge him as trustee for rents and profits of the property purchased by him, both real and imaginary. It thus changed entirely the cause of action as well as the parties; and it was not competent for the court to permit such an amendment. (3rd Estee Pl., page 296, sect. 7; Ramicez vs. Murray, 5 Cal., page 222; 1 Paige, Ch. Repts, page 572; 1 ed. Ch. Repts. page 46; Story's Eq. Pl., page 884; 17 Howard U. S., page 130; 6 Paige, page 46; 2nd Estee Pl., page 293; 14 Peters, page 156; Barth vs. Bacon, 10 Pickering, page 123.)

Fifth. The court also erred in taking up the amended motion of plaintiffs to strike out parts of answer, instead of requiring it to
244 lay over for twenty-four hours under the rule. (See record, pages 46 and 47, containing the exceptions of the defendant.)

The court erred in striking out that portion of defendant Fort's answer setting up the balance of $1,492.24 due on his judgment against plaintiffs, and asking that it be revived and set off against any claim of plaintiffs for rents and profits. (See record, pages 45 and 46, and exception on record page 47. See also record, pages 32 and 33, where the answer appears.) The defendant was clearly entitled to have his original judgment revived in this action, after the sale under this judgment had been set aside. Equity would not remit him to another action for that purpose, when the matter could as well be adjusted in the present action. (See Cod. Statutes, sect. 57; Mangewheim vs. Graham, 39 Cal., page 169; Rathborn vs. Warren, 10 John., pages 589 and 596; King vs. Baldwin, 17 John., page 384; Hipborn vs. Weatar, 1st Wheaton, page 197; 1st Story Eq. Juris., sects. 457, 464, and 473; Story Eq. Pl., sects. 389, 390, 391, 392, 393, and 394, and 366, and 373; 2nd Story's
245 Eq., sec's 1435 and 1436; Ord vs. McKee, 5 Cal., page 515 and 114.)

Besides, in this case, the plaintiffs have themselves recognized the justice and equity of settling and adjusting the balance of the judgment of defendant in this action, and in their amended and supplemental complaint allege that their claim for rents and profits, and for the use and occupation "should be set off against any balance which may be due upon the said decree." (See the transcript of the record herein, page 13.)

The defendant was only asking that that should be done which plaintiffs themselves say ought to be done, and yet the court struck out that portion of the answer making this claim.

The plaintiffs in their complaint set up the agreement by which the defendant was to apply these rents and profits upon this judgment or decree in his favor until it should be paid, and that such rents were assigned to him for this purpose. (See transcript of the record herein, page 5 and 6.)

In the accounting, such balance due on the judgment must be considered by virtue of the agreement, if for no other reason; and the rents and profits cannot be diverted from the purposes for which they
246 were pledged. A trustee required to account cannot possibly be required to account for any more than the balance in his hands, after deducting what was due him, and especially is this the case where

is charged as such trustee by virtue of an agreement to apply the monies in his hands to the amount so due him. The failure of the defendant to enter a credit for the rents collected by him upon his execution, confers no right to cancel and destroy the judgment existing in his favor. As no such penalty is contemplated or provided by law.

The court also clearly erred in refusing to permit the defendant to file an amendment to his answer, or the amended answer setting up the insolvency of the plaintiffs, and asking a revival of his judgment, and to set off the same on account of such insolvency. (See record, pages 48, 49, 50, and 52. Also see the transcript of the record herein, page 63, where such amendment was incorporated in a new answer.)

If such set-off was not proper in the accounting as a plain equity and necessity under the agreement with the defendant, there could be no question of the right in case of insolvency of the plaintiffs. (See
247 Hobbs vs. Duff, 23 California, page 625; Russell vs. Conway 11 Cal., page 93; Naglee vs. Palmer, 7 Cal., page 547; Walker vs. Sedgwick, 8 Cal., page 398.)

The court also clearly erred in directing the referee to ascertain what was due from Fort, as found, by report of W. E. Cullen, master. (See transcript of the record, pages 54 and 55, being the first clause of reference.) Such balance was only found on the basis of the sale under the decree being sustained. When such sale was set aside the defendant Fort did not have any balance in his hands due plaintiffs on account of such sale, but on the contrary the plaintiffs became indebted to him to the extent of the balance of his judgment.

The court also clearly erred in directing the referee to charge the defendant Fort as for the occupancy of the premises he had purchased under the decree. In no view of the case could the defendant be charged as trustee with more rent than he received or might have received by the use of due diligence. (Osgood vs. Franklin, 2 John. Ch. Repts, page 1; 14 John., page 527; 1 Vern., page 144; 1 Vesey Jur., p. 193; 1 Perry on Trusts, sec. 441; 20th Barbour, page 141.)

248 If the court had the right to charge the defendant Fort with more rents than he could have received by the use of due diligence, then there was no limit to his liability. It depended solely upon the caprice of the referee and not upon any rule of law. It is not claimed that the defendant was in the possession of the property unlawfully. He was in possession, collecting the rents under an agreement with the plaintiffs. Neither is it charged in the complaint that he failed to use due diligence in renting the property, or that he rented it for less than he might have received.

The only wrong of which the plaintiffs can possibly complain is that the defendant issued his order of sale under the decree for $3,242.68 instead of $3,022.22. For this error the sale was set aside. The referee, W. E. Cullen, found that in all other respects the sale was honestly and fairly conducted.

The complaint does not aver that any damages were sustained by plaintiffs in consequence of this error. But the court in the 3rd clause of reference (page 55 of the transcript of the record) submitted this question to the referee, and he reported no evidence was offered
249 of any damage sustained in consequence of this error and did not find any damages. (See record, page 89.) Then it no damages were sustained by plaintiffs in consequence of the only error or wrong or fraud committed by the defendant, on what pretense could he be charged with more rents and profits than he received when there is no

charge or proof of negligence or fault in the management of the said property.

The defendant has already suffered the penalty of failure to credit the execution by having his sale thereunder set aside. This penalty was legitimate, but to require him to pay more than he received for the rents of the property in his charge without proof of negligence is a punishment that is arbitrary in its character and has no connection with the wrong complained of. Any other penalty would have been as legitimate and proper as this. It would have been just as appropriate arbitrarily to tax him $2,000 or $3,000 for the fraud or mistake, without any proof of injury to plaintiffs, as to tax him with more rents than he was able to collect. In neither case would the punishment have any connection with the injury or wrong. The fruits of this error are patent in the report of the referee. He charged Fort with over $3,300.00
250 for the rents, use, and occupation of the property purchased by him, while the complaint of the plaintiffs only charges him with $1,100.00, viz, $600.00 for rents collected and $500.00 for occupation. (See transcript of the record, page 15.) The evidence of Fort, Fox, and Carr showed that in reality Fort collected less than $200.00 from rents after deducting for taxes and repairs. He charges Fort seventy-five dollars per month for the rent of lots 3 and 99, in block 20, from November 10, 1871, to Nov. 10, 1872, when the evidence of Fox, the agent of Fort: Carr, the tenant on the premises; P. T. Williams, and others showed clearly that Fort did the best he could with the property, and treated and regarded it as his own, but could not keep it rented at more than twenty dollars per month. He charges Fort on purely speculative evidence with $60.00 per month for the use of the same property from Nov. 10, 1872, to Nov. 10, 1873, while the evidence of Fox, the agent, as well as that of the tenant, Carr, was to the effect that in fact the rent had to be reduced from $20.00 to $12.50 per month during that period to keep the premises rented at all. He charges Fort with $50.00 per month for the rent of the same property from Nov. 10, 1873, to January 9,
251 1874, when the same parties above named and others establish that the property could not be rented at any price in fact, although notices for rent were placed upon the property; and he also found the vacant lots to be worth $25.00 per month after said January 9, 1874, in the face of the evidence that nothing could in reality be realized from the lots. These findings, too, were all made without any evidence whatever that Fort was guilty of any negligence, and in the face of the positive evidence that he treated the property as his own and did the best he could with it.

All of which is respectfully submitted.

WOOLFOLK AND PORTER,
Att'ys for Appellant.

(Endorsed:) Geo. & Eliza Roush vs. Henry T. Fort et al. Brief of H. T. Fort, appellant. Filed Jan'y 16, '78. I. R. Alden, clerk.

And afterwards, to wit, on the 22nd day of January, A. D. 1878, the said appellant in obedience to the order of this court heretofore made and entered, to perfect the record in said cause in conformity with his suggestion in writing of a diminution of the same, filed herein a certified copy of the original complaint and of the amendment thereto, the
252 answer of the defendant to said original complaint, the opinion and remittitur of the supreme court, which said copies are in the words and figures following, to wit:

In the district court, 3rd judicial district Lewis and Clarke County, Montana Territory. In chancery.

GEO. ROUSH AND ELIZA ROUSH, HIS WIFE,
vs.
HENRY T. FORT, FREDERICK REECE, AND I. W. Stoner.

Be it remembered that among the records, pleadings, and proceedings had and done in this cause and on file in this court are the following, to wit:

Complaint.

In third judicial district court, Lewis and Clarke County, Montana Territory. In chancery.

GEORGE ROUSH AND ELIZA ROUSH, HIS WIFE,
vs.
HENRY T. FORT, FREDERICK REECE, AND I. W. Stoner.

The plaintiffs, by G. G. Symes, their attorney, complaining in this their bill of complaint, respectfully show unto this honorable court and allege—

253 1st. That on the 23rd day of February, 1871. the defendant, Henry T. Fort, commenced an action in the said district court against the plaintiffs, George and Eliza Roush, to foreclose a certain mortgage executed on the 22nd day of October, 1869, by the above named plaintiffs to the defendant, Henry T. Fort, on certain real property owned by said plaintiffs, to secure the payment of a certain promissory note executed by said plaintiffs to said defendant, for the sum of $2,000, payable twelve months after date, with interest at three per cent. per month; and that such proceedings were thereafter had that, on the 16th day of March, 1871, a decree was rendered by the said court in the said action for the foreclosure of the said mortgage mentioned, to satisfy the amount due on said note, which was adjudged to be $2,895.

2. Plaintiffs further state that, under and by virtue of said decree of foreclosure, and a pretended order of sale, issued to one W. L. Steele, at that time ex-sheriff of said county of Lewis and Clarke, and Montana Territory, said ex-sheriff did, on the 10th day of November, 1871, pre-

254 tend to sell the property described in said mortgage and decree of foreclosure, and owned and possessed by the said plaintiffs to the defendants, Henry T. Fort, Frederick Reece, and I. W. Stoner, and did give to the defendant at said time a pretended certificate of sale, certifying that he had purchased the following described property, to wit, lot 99 and lot 3, in block 20, on Main street, in the town of Helena, in said county; also lot 7, in block 40; also lots 16 and 17, in block 40, in said town and county, and that he would be entitled to a deed for the same; and did give to the defendant, I. W. Stoner, a like certificate of sale to the following portion of said property, to wit, lots 10 and 11, in block 40, in said town and county; and did give to the defendant, Frederick Reece, a like certificate of sale to the following portion of said property, to wit, lot 6, in block 40, and lot 12, in block 40, in said town and county, being all the property mentioned in said

mortgage and decree and owned by these plaintiffs; and that the said ex-sheriff aforesaid will, unless restrained by order of this court, make and deliver to said defendants, within six months from the time of said sale, deeds to the said real property, pretending to convey the title of the said property to the defendants, and thereby throw a cloud
255 upon the title to the said property owned by these plaintiffs and work a great and irreparable wrong and injury to them, and will continue to greatly damage them.

3. Plaintiffs further show that when said ex-sheriff pretended to sell the said property as aforesaid, for the sum of about $3,400, and that there was not due on said note and mortgage more than the sum of $2,200, and that under and by virtue of said pretended sale the said defendants wrongfully took possession of the said property, and have held possession of the same and collected and received the rents and profits thereof, to the great damage and injury of the plaintiffs, and they threaten to continue to so collect and receive the said rents and profits.

4. Plaintiffs further allege and charge that the said ex-sheriff had no jurisdiction, power, or authority to make the said sale; that no title or right to the possession of the said property passed by the said sale, and all proceedings connected therewith are irregular, illegal, and void, and that all acts and pretended acts of the said ex-sheriff in and about the premises aforesaid were wholly null and void.

5. Plaintiffs further show that they have no sufficient or ade-
256 quate remedy at law. The injuries complained of herein are irreparable and continuing.

Wherefore the plaintiffs pray for relief, which they can only obtain in a court of equity, that the sale and all proceedings thereunder or connected therewith be set aside and decreed to be of no force or effect; that the plaintiffs be restored to the possession of their said property, and that they be decreed such further and other relief in the premises as may be equitable and just and as to this court may seem meet and just and equity may require, and for costs, and that the defendants be restrained from in any way interfering with the said property until the final hearing of this suit.

G. G. SYMES,
Att'y for Plaintiffs.

TERRITORY OF MONTANA,
County of Lewis and Clarke:

George Roush, being duly sworn, says that he has heard the foregoing bill of complaint read and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to be on information and belief, and as to those matters he believes it to be true.

(Signed) GEORGE ROUSH.

257 Subscribed and sworn to before me this 22nd day of April, 1872.

GEORGE G. SYMES,
Notary Public.

And afterwards, to wit, on the 6th day of November, 1872, the plaintiffs filed his amendment to the complaint, in the words and figures following, to wit:

In third judicial district court, Lewis and Clarke County, Montana Territory.

GEORGE AND ELIZA ROUSH, PLAINTIFFS,
vs.
HENRY T. FORT ET AL., DEFENDANTS.

The plaintiffs, by leave of court first had and obtained, make the following amendment to their bill of complaint filed herein:

First. That when the said sheriff sold the property as in the said complaint alleged, he expressly directed and requested the said officer making the sale to sell the property in certain separate pieces in a certain order, but that said sheriff paid no attention to his request and refused to sell the said property in the order he requested, but sold it in an entirely different order, and did sell the business lot and house on
258 Main street first, which he expressly requested should be sold last; that plaintiffs believe the said property, if sold as they requested, would have brought more than it did as the same was sold.

Second. That after the judgment was rendered on which the said property was sold, the defendant, Henry T. Fort, the judgment creditor, entered into an agreement with the plaintiffs whereby it was agreed in writing that the plaintiffs should assign to the said defendant all the rents arising, due, or to become due on the said property, in consideration whereof the defendant was to collect the said rents, which amounted to about two hundred dollars per month, and apply the same in payment of the said judgment. And it was expressly agreed and understood that so long as the defendant should be allowed to receive the said rents he would not have the property sold under his decree of foreclosure; that in direct violation of said agreement the defendant did sell the said property, when he was receiving the rents, without giving the plaintiffs any credit for the rents he had collected and which ought to have been credited on said judgment. That the said sale made in violation of said agreement was inequitable and a surprise to the
259 plaintiffs, and prevented them from procuring bidders for said property, and was one of the causes why said property brought so much less than its real value.

S. ORR AND GEORGE G. SYMES,
Counsel for Plaintiffs.

MONTANA TERRITORY,
Lewis and Clarke County, ss:

George Roush, being duly sworn, says that he is one of the plaintiffs mentioned in the foregoing amendment to the complaint in this action; that he has heard it read and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

GEORGE ROUSH.

Subscribed and sworn to before me this 11th day of November, A. D. 1872.

GEORGE G. SYMES,
Notary Public.

And on the 14th day of December, A. D. 1872, the defendant Henry T. Fort made his answer to the amendment to plaintiffs' complaint in the words and figures following, that is to say:

In the district court, 3rd judicial district, Lewis and Clarke County, Montana Territory.

GEORGE ROUSH AND ELIZA ROUSH, PLAINTIFFS,
vs.
HENRY T. FORT ET AL., DEFENDANTS.

And now comes the defendants, and for answer to that portion of the plaintiffs' amended complaint not stricken out heretofore by the court—

1st. Denies that said sheriff paid no attention to or failed or refused to sell said property in the order and in the manner requested or directed by plaintiffs, or that said sheriff sold the same or any part thereof in a different order than he was requested or directed by the plaintiffs.

2. Denies that said sheriff did sell the business house and lot on Main street against the request of plaintiffs, and charges and avers that the same was sold in the order directed by plaintiffs.

3. Denies that said property, if sold in any manner for cash, would bring more or even as much as the same sold for at said sale.

4. Admit that after the rendition of said judgment the said plaintiffs and this defendant, Henry T. Fort, entered into an agreement
261 with respect to the sale of said mortgaged property under said decree and order of sale, duly made and entered in said cause, and avers that said property was sold in strict accordance with said agreement, and in the manner directed by said order of sale and agreement, and for the amount therein specified and due.

Admits that by the terms of said agreement defendant was to collect the rents of said property until the sale thereof under said order and agreement, if the same could so be done, and avers that the rents so collected were to be applied upon and all other claims and demands against plaintiffs or their property then due or to become due the defendant, and the balance, if any, to be applied upon the interest due defendant, according to said agreement, and if any residue the same was to be applied upon said judgment; all of which was done accordingly.

Denies that it was expressly or otherwise agreed that said defendant would not sell said property under his decree and orders of sale, so long as he was allowed or permitted to collect said rents—a copy of which agreement is hereto attached and made a part of the answer.

262 Denies that, in violation of said agreement or any agreement whatever, defendant applied or failed to apply said rents, and avers that the same were applied in strict accordance therewith, and for the amount due as aforesaid.

Denies that the sale made under said orders and decree was inequitable or any surprise to plaintiffs or prevented them from procuring bidders on said property.

Denies that said property brought any less than its value for any cause or reason assigned in said complaint or any other cause or reason.

Defendant further states that said property was sold in accordance with and in pursuance of said decree, order of sale, and stipulation, and as requested by plaintiffs.

Wherefore defendant asks that said bill be dismissed with costs.

TOOLE AND TOOLE,
Atty's and Solicitors for Defendant.

TERRITORY OF MONTANA,
County of Lewis and Clarke, ss:

Henry T. Fort makes oath and says that he is one of the de-
263 fendants herein; that he knows the contents of the foregoing

answer, and that the matters therein stated are true of his own knowledge.

H. T. FORT.

Subscribed and sworn to before me this 14th day of December, A. D. 1872.

W. E. CULLEN,
Master in Chancery.

Opinion of supreme court.

In the supreme court of Montana Territory, January term, A. D. 1876

GEO. ROUSH ET AL., APPELLANTS,
vs.
H. T. FORT ET AL., RESPONDENTS.

Opinion of the court by Blake, associate justice.

On February 23rd, 1871, the respondent, Henry T. Fort, commenced an action against the appellants to foreclose a mortgage upon real property, and obtained on March 16, 1871, a judgment for $2,895. On November 10, 1871, the premises were sold by the sheriff under an
264 execution to the respondents, Fort, Reece, and Stoner, who purchased separate parcels and received certificates of sale for the same. On April 23rd, 1872, the appellants commenced an action against the respondents, and file their complaint, alleging that the sale was irregular and void, and asking that the same be set aside, and that the possession of the property be restored to the appellants. The cause was referred to a master in chancery, who reported his findings on March 5th, A. D. 1873. The court below then ordered that the sale be confirmed, and that the respondents have the rents, issues and profits of the property from the day of the sale, and the aggrieved parties appealed.

On July 8, 1871, Fort and the appellants made a written agreement by which the property was not to be sold until after October 1, 1871. Fort was to have the possession and income of the property, and apply the rents at the end of every month upon the judgment or any other indebtedness held by him against the property. Fort was to receive interest at the rate of 2½ per cent. per month, from July 1, 1871, upon this and another judgment owned by him. Under this agreement Fort collected $815 and paid $159.79 to redeem the property from a tax sale, at which he was the purchaser, and $84.05, the amount of the tax
265 for A. D. 1871. No part of this sum was applied upon the judgment by Fort. On the day of the sale there were due to Fort upon the judgments $3,055.79, after deducting all credits to which the appellants were entitled, including the interest agreed upon and the amounts paid on account of the taxes. Fort caused the property to be advertised and sold for the full amount of the judgments, $3,342.68. The sale appears to have been legal in other respects, and we must determine the effect of the irregularities, which have been specified, upon the rights of the parties.

An execution, which issued in excess of the judgment, can be amended upon motion, and is voidable and not void. A mistake of this character, committed by an officer or party interested in the writ, does not entitle the appellants to the relief prayed for in their complaint. The

executions were regular upon their face, and were issued upon two valid judgments against the appellants. Reece and Stoner had no notice of the agreement between Fort and the appellants, and purchased their portions of the property in good faith, and for a valuable consider-
266 ation. In Hunt vs. Loucks, 38 Cal. 372, Judge Sanderson reviews the authorities and says, "We understand the settled rule to be that if the execution be merely erroneous, that is to say, voidable, a sale under it to a bona fide purchaser will be valid, although the execution be afterwards set aside." * * * * "An execution which is amendable is not void, and an execution which merely calls for too much money is amendable." (Blood vs. Light, 38 Cal., page 649, and cases cited.)

The appellants made no motion to amend the executions before the day of the sale, and the rights of Reece and Stoner as purchasers of the property of the appellants cannot be affected by this action. The appellants cannot obtain the relief asked for against Fort if the executions were issued in excess of the judgments through a mere mistake upon the part of Fort. But the legal relations of these parties were changed by the agreement which was entered into. Fort then occupied the position of a trustee for the appellants, and was required to apply upon the judgments certain funds which came into his hands. Fort reaped all the advantages of the bargain upon his side, and received an exhorbitant rate of interest when the statute allowed him ten per cent. per
267 annum, and acquired the possession of the property before he could obtain the same by legal process. After failing and neglecting to perform his trust by applying upon the judgments money which he had received for this purpose, Fort caused the executions to be issued for the sale of property to satisfy the judgments and became a purchaser. Will a court of equity tolerate this conduct?

The law guards sedulously the rights of the debtor in the steps that are taken for the sale of his property, and will not sanction the slightest undue advantage over him. In King vs. Platt, 37 N. Y., page 160, the court says, "A court of equity justly scrutinizes the conduct of a party placed by the law in a position where he possesses the power to sacrifice the interests of another in a manner which may defy detection, and stands ready to afford relief on any slight evidence of unfair dealing, whether it is made necessary by moral turpitude or only by a mistaken estimate of others' rights." The authorities support the doctrine that a sale will be set aside where there has been misconduct in the purchaser. (Lefevre vs. Laraway, 22 Barb., page 167, and cases cited. Reece vs. Busby, 13 How. Pr., page 485.)

268 In Tripp vs. Cook, in 26 Wendell, page 158, it is decided that the holder of a mortgage does not stand upon the same footing of public policy with other buyers. Fort misapplied the funds entrusted to him, endangered the interest of the appellants, and showed a want of reasonable fidelity to his trust. (1 Story Equity, sect. 239; 2 Story Eq., sect. 1289.) We cannot allow a party to take advantage of his own wrong, and think that the sale of the property of the appellants to Fort must be set aside.

It is therefore ordered and adjudged that the judgment of the court below, confirming the sale of the property of the appellants to the respondents, Reece and Stoner, and giving said parties the rents, issues, and profits of the same from the day of the sale be affirmed; and that the judgment confirming the sale of the property of the appellants to the respondent Fort, and giving to said Fort the rents, issues, and profits of the same from the day of the sale be reversed with costs, and that

the sale to said Fort be set aside and vacated, and that this action be remanded for further proceedings.

DECIUS S. WADE,
Chief Justice.
HIRAM KNOWLES,
Asso. Justice.
HENRY N. BLAKE,
Asso. Justice.

Filed Feb'y 5, 1876.

I. R. ALDEN, *Clerk.*

269 *Remittitur.*

In the supreme court, Territory of Montana, January term, A. D. 1876.

The chief justice of the supreme court of the Territory of Montana to the honorable judge of the district court of the 3rd judicial district of the Territory of Montana, in and for the county of Lewis and Clarke, greeting:

Whereas lately, in the district court of the 3rd judicial district of said Territory and county, before you, in a cause between George and Eliza Roush, plaintiffs and appellants, and Henry T. Fort et al., defendants and respondents, wherein the judgment and decree of said district court, entered in said cause on the day of March, A. D. 1873, is in the words and figures following, that is to say:

"Be it remembered, that plaintiffs' motion to set aside the master's report herein coming on to be heard, and at the same time said defendants' motion for a confirmation of the sale also coming on to be heard, and it appearing to the satisfaction of the court that said plaintiffs have wholly failed to make out their case, and that the facts set up in
270 their complaint as amended herein are untrue in every material respect, it is therefore ordered that said plaintiffs' motion be overruled and said defendants' motion be sustained; and that said sale be affirmed, and defendants have the rents, issues, and profits of said property from the date of such sale," as, by the inspection of the transcript of the record of the said district court in said cause, which was brought into the supreme court of the Territory of Montana, by virtue of an appeal, agreeably to the statute of the said Territory in such case made and provided, fully and at large appears.

And whereas, in the present term of January, in the year of our Lord one thousand eight hundred and seventy-six, the said cause came on to be heard before the said supreme court upon the said transcript of record, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court aforesaid in said cause, confirming the sale of the property of the appellants to the respondents Reece and Stoner, and giving said parties the rents, issues, and profits of the same from the day of the sale be affirmed, and that the judgment confirming the sale of the property of the appellants to the re-
271 spondent Fort, and giving said Fort the rents, issues, and profits of the same from the day of the sale, be reversed with costs; and that the sale to said Fort be set aside and vacated, and that this action be remanded to the said district court for further proceedings.

And it is further ordered that the said appellants, George Roush and

Eliza Roush, recover against the said respondent Henry T. Fort forty-two dollars for their costs in this behalf expended and have execution therefor.

5th February, 1876.

You therefore are hereby commanded that such execution and proceedings be had in said cause as according to right and justice and the laws of the Territory of Montana ought to be had, the said appeal notwithstanding.

Witness the honorable Decius S. Wade, chief justice of the supreme court of the Territory of Montana, this 19th day of February, A. D. 1876.

Appellants' costs, $42.00.

[SEAL OF SUP. C'T.] I. R. ALDEN,
Clerk of the Supreme Court of the Territory of Montana.

TERRITORY OF MONTANA.
County of Lewis and Clarke, ss:

I, Alexander H. Beattie, clerk of the district court of the 3rd ju-
272 dicial district of the Territory of Montana, do hereby certify the foregoing to be a true and correct transcript of the original bill of complaint, amendment to complaint, defendants' answer to said bill of complaint, and the opinion and remittitur of the supreme court in the case of George and Eliza Roush, plaintiffs, against Henry T. Fort, Frederick Reece, and Isaac W. Stoner, as the same appears of record and on file in my office.

Witness my hand and official seal hereunto affixed, this 2nd day of January, A. D. 1878.

[SEAL OF DIST. C'T.] ALEX. H. BEATTIE, *Clerk.*

(Endorsed:) 263. Geo. Roush and Eliza Roush, his wife, respondents, vs. Henry T. Fort et al., appellants. Supplemental transcript. Filed January 22d, A. D. 1878. J. R. Alden, clerk.

And afterwards, to wit, on the 23rd day of January, A. D. 1878, the said respondents Geo. and Eliza Roush, by their attorneys of record, Messrs. Chumasero and Chadwick, and Messrs. Sanders and Cullen, filed in said cause their brief of points and authorities relied on upon appeal, of which said brief of points and authorities in words and figures the following is a true and correct copy, that is to say:

273 *Respondents' brief.*

In the supreme court of the Territory of Montana, January term, A. D. 1878.

GEORGE AND ELIZA ROUSH, RESPONDENTS,
vs.
HENRY T. FORT ET AL., APPELLANTS. } 263.

After the remittitur of this case to the district court, upon application to that court, respondents obtained leave to file an amended and supplemental complaint, and an order on Fort to plead to the same within a time named. Fort did not plead to the same, but was in default some six months, when he applied to have the default opened and to be let in to defend. The court granted to the defendant Fort his motion, but required him to answer to the merits of the action. (See pages of record.) No default should ever be set aside except to permit a trial on the merits. (Macomber vs. Mayor & Co., 17 Abbott Tr. Rep., page

35.) The uniform requirement is not to open a default unless the party in default has a good defense on the merits. Defaults can only be opened "when in furtherance of justice," and then only "on such terms as may be just." (See sec. 76, page 42, Codified Statutes of Montana Territory.)

274 Technical defenses and dilatory pleas permitted to non-resident defendants who are in court asking as a matter of grace relief from their neglect would be an abuse of discretion, and the court in this case not only did not abuse that discretion, but exercised it justly.

The defendant, by the decision of this court (2nd Montana Reports, page), was adjudged to have wrongfully taken and kept possession of the premises, and he became, what his attorneys will not comprehend, a trustee by reason of his mala fides, and chargeable with the value of the use of the property which he thus wrongfully obtained by virtue of his fraudulent execution and sale. This record does not show that the defendant was not served with a copy of this complaint, and all complaints of that error fall to the ground. There was no objection or exception made at the time to the order requiring defendant to answer at the time specified, and defendant did answer, and thereby waived the point he now seeks to make here.

It was also proper, in consideration of the new phase which the
275 case assumed by the decision of this court, that the bill should be retained to settle all matters growing out of the transaction as to the property described in the original complaint, and to this end a supplemental complaint was essential and an amended one proper. (See 57 N. T., 562; Chuff vs. Dorland, 28 New York, pages 508–30.)

Fort's judgment in the court does not need rendering again to entitle it to the rights of a judgment, and there was no error in the action of the court thereon. Besides, there was but one way to set aside its satisfaction, and that is prescribed by statute, and was not followed. (See sect. 286, page 89, Laws 1871 and 1872.)

The charging of the wrongful occupant of premises as a trustee de son tort is of frequent occurrence, and in pursuing our right to the property sold and the proceeds of it, found Fort in that position, and the court, to do the complete justice between the parties, which was the object of the original suit, only fulfilled the functions of a court of equity, and the ignoring of this aspect of the case by appellant's counsel will not make the supreme court lose sight of it. (Perry on Trusts,
276 vol. 1, sects. 240 and 245.) Wrongfully in possession, he was accountable not for what volunteer and unpaid agents got for his property, but for what with due diligence he might have got. This rule of law is as exact as could be invented. If he did not want to pay this, he should have pursued his legal rights by legal means, and honestly.

The findings of the referee were sustained by the proof of the witnesses best acquainted with the value of property at the time, and who knew whereof they testified, by their own dealings with this or similar property, nor are any points on this subject saved.

It is many times repeated in appellant's points that the court clearly erred. Clearness is a merit. If it cannot be said of the errors of law and perversions of fact in appellant's brief that they are clear, we think it can be said, nevertheless, that they are palpable.

CHUMASERO & CHADWICK AND
SANDERS AND CULLEN,
Attorneys for the Respondents.

(Endorsed:) 263. In sup. court. Geo. Roush et al. vs. Henry T. Fort et al. Respondents' brief. Filed January 23d, A. D. 1878. I. R. Alden, clerk.)

277 And afterwards, to wit, on the 24th day of January, A. D. 1878, this cause came regularly on to be heard before the court on the transcript of the record filed herein, and was argued by counsel and submitted.

And afterwards, to wit, on the 28th day of January, A. D. 1878, said cause came on for the decision and order of the court on appeal; whereupon the court, by Justice Blake, delivered its opinion in said cause in writing, of which said opinion in words and figures the following is a copy, to wit:

In the supreme court of Montana Territory, January term, A. D. 1878.

GEORGE ROUSH ET AL., RESPONDENTS,
vs.
HENRY T. FORT, APPELLANT.

Opinion of the court by Blake, associate justice.

This is the second appeal that has been taken in this case. It is not necessary to repeat the facts, which are stated in the opinion on
278 the first appeal that has been reported (2 Montana, page 482). After this decision had been rendered and the cause had been remanded to the court below for further proceedings, the respondents filed, March 15, 1876, their amended and supplemental complaint by leave of the court. The respondents moved for judgment on this complaint December 7, 1876, and the court ordered that the appellant be permitted to answer to the merits upon the payment of all costs. When this complaint was filed in open court it was ordered that the appellant plead on or before March 18, 1876. At the hearing upon the motion for judgment, the appellant asked leave to file a motion to strike the complaint from the files, because no copy had been served on them or his attorney, and the amendment changed the character of the action and the parties thereto. The court refused to permit this motion to be filed and made no other order than that which has been mentioned. Afterward an answer was filed and the court sustained two motions by the respondents relating to the striking out of parts of and filing amendments to the same. Judgment was entered on the report of a referee in favor of the respondents. We intend to review the errors com-
279 plained of, in the order in which they appear in the record.

The appellant contends that the court acquired no jurisdiction over him until a copy of the amended complaint had been served on him or his attorney. We think that he is correct in this position. The civil practice act requires a copy of the amendments to be served upon the defendant, "or upon his attorney, if he has appeared by attorney. The defendant shall answer in such time as may be ordered by the court, and judgment by default may be entered upon failure to answer, as in other cases." (Civil Prac. Act, sect. 53.) In the original action and on the hearing of the first appeal, E. W. Toole, esq., appeared as an attorney for the appellant. The clerk of the court below was directed to serve upon said Toole a copy of the amended complaint, but the latter refused to receive it, and then said that he had ceased to be an attorney in the action. It appears that the appellant resided in the State of Mis-

souri in 1876. It does not appear that said Toole ever withdrew his appearance as an attorney in the cause, or notified the respondents that his connection with the same had ceased, or that any attorneys
280 had been substituted in his place. While the name of Mr. Toole remained on the record as the attorney of the appellant, he was the proper person on whom the service of a copy of the amended complaint could be made. When he refused to take the same from the clerk he waived his rights and those of the appellant thereto. The respondents complied with the statute by attempting to serve the copy on Mr. Toole after he appeared as the attorney of the appellant. It is claimed that the amended complaint changed entirely the character of the action. If the amendments had this effect the authorities hold that courts will not permit them to be filed. (Pratt vs. Bacon, 10 Pickering, page 123; Shields vs. Barrow, 17 How., U. S., page 130.)

The civil practice act has modified this rule in one respect, and "where facts occurring subsequent to the commencement of the action render it proper, the same may be presented by supplemental pleadings and issue taken thereon in the same manner as in the case of original pleadings." (Civ. Pr. Act, sec. 75.)

Upon an examination of the complaint in this case, on which the first appeal was heard, it is readily seen that the judgment of this court, to the extent that it disposed finally of certain issues
281 which appear therein, made some amendments not only proper but necessary on the part of the respondents. The controversy between the respondents and Reece and Stoner was determined by this court at the January term, 1876 (Roush vs. Fort, supra), and it was therefore proper that Reece and Stoner should be no longer retained in an action in the result of which their rights could not be affected. It is also apparent that a number of the matters relating to the appellant and respondents were undecided, and the case was remanded to the court below to secure a trial of the same. This court established the legal relations of the appellant and respondents, and defined the remedy of the respondents, and the respondents were compelled to amend their pleadings in conformity with the ruling in Roush vs. Fort, supra. Under these circumstances it would be proper to present these facts which had occurred since the commencement of this action. (Pomeroy on Remedies, sec. 566, and cases there cited.)

In Robinson vs. Willoughby, 67 N. C., page 84, the action was brought to recover the possession of land under a deed that was absolute on its face. The court, on appeal, held that this deed was a mortgage, and reversed the judgment of the court below, and ordered a new trial.
282 Before the second trial, an amendment was permitted changing the cause of action from its original form to *to* one for the foreclosure of this mortgage. We are satisfied that it was proper for the court below to permit the supplemental complaint to be filed, and the order requiring the appellant to answer within a certain time was made according to the civil practice act, supra. While the appellant was ordered to file his answer on or before March 18, 1876, no action was had in the cause until December 7, 1876, and the default of the appellant might have been entered at any time between these dates. No excuse was offered for this delay, and there was no error in the order, which the court made in the exercise of its discretion, that the appellant must answer to the merits and pay certain costs. The circumstances which have been mentioned brought the parties within the seventy-sixth section of the civil practice act, which authorizes the court, in furtherance of justice and on such terms as may be deemed proper, to enlarge the

time for an answer. After the appellant filed his answer, the court, on the motion of the respondents, struck therefrom a part which alleged that the respondents were indebted to the appellant in the sum
283 of $1,492.24 on account of the judgment rendered in the action in which the appellant foreclosed his mortgage, and prayed that the same might be revived and set off against the claims of the respondents for rents and profits. The court also refused to allow an amendment to be made to the answer, which embodied the same facts that had been passed upon in considering the motion to strike out, and contained an allegation that the respondents were insolvent.

The appellant insists that the court heard this motion in violation of the rules, which allowed the appellant twenty-four hours to examine the same. Conceding that the action of the court is irregular, it did not injure the appellant, and his substantial rights have not been affected.

The appellant cites the authorities which decide that parties will not be remitted to another action when the matters in controversy can be adjusted in one which is pending, and declare the principles applicable to set-off and counter claims. This court has announced similar doctrines. (Wells vs. Clarkson, 2 Mon., page 230; Boley vs. Griswold, 2 Mon., page 447.) In the last case we held that a party who had filed
284 a motion to set aside the satisfaction of a judgment and revive it had no standing in a court of equity until the same had been determined in his favor, and that he had no debt which could be a set-off. Under the proceedings in the action by the appellant to foreclose the mortgage, the property of the respondents was sold by the sheriff and the judgment was satisfied. This court in Roush vs. Fort, supra, set aside the sale of the property to the appellant, and the appellant contends that the satisfaction of the judgment, to the amount that it was affected by this decision, should be vacated and the judgment therefor revived. The civil practice act protects in the most ample mode the rights of the appellant and points out his remedy. He was authorized to file a petition, and the court is compelled to revive the original judgment when the facts show that the property was not sold according to law. The appellant should have acted diligently and resorted to his statutory remedy after the sale to him had been adjudged void. He never filed any petition relating to this judgment, and the court below followed the rules which had been laid down in Boley vs. Gris-
285 wold, supra, and properly sustained the motion to strike out and disallowed the amendment. The case was referred and the referee was instructed to report upon certain issues. The judgment that is appealed from limits our inquiry into the action of the referee to the following matters. After the property had been sold by the sheriff under the execution obtained by the appellant, there remained in the hands of the appellant $107.76, which belonged to the respondents. If this court had confirmed this sale the respondents would have been entitled to receive this amount. But when the sale was set aside on account of the fraudulent conduct of the appellant, the respondents who had procured this result by their appeal in Roush vs. Fort, supra, waived their rights to recover the sum of $107.76. Instead of confirming the act of their trustee, which the respondents might have done, they elected another remedy and must suffer the consequences. They cannot demand $107.76 and the interest thereon and, at the same time, treat the sale by the sheriff as void and hold the appellant responsible for the rents and occupation of the property, to which it has been adjudged that the appellant had no valid title. The amount of this sum, with the inter-

286 est from November 10, 1871, to June 30, 1877, is $168.51, which was found by the referee and forms a part of the judgment in this action. We think that the court erred in finding that the appellant was indebted to the respondents in any sum by reason of this item. Under the directions of the court below, the referee found that the value of the use and occupation of the property which the appellant bought at the sheriff's sale, from 10, 1871, the date of the sale, to February 5, 1876, when the sale was set aside, was $1,720.00 The sheriff delivered to the appellant, November 10, 1871, a certificate of sale, and during the following six months the respondents had the statutory right to redeem the property from the purchaser. The appellant was not entitled to enter upon its possession, or receive the rents arising therefrom, during this period by any legal process. But he continued to enjoy all these rights of ownership under the agreement, which is referred to in Roush vs. Fort, supra, and created him a trustee for the respondents. What were the obligations of the appellant during this term? He should have exercised such prudence, care, and diligence in the management of the property and collection of the rents as men of ordinary diligence,
287 care, and prudence manifest in like matters of their own. (Miller vs. Proctor, 20 Ohio State, page 442; Perry on Trusts, sects. 441 and 527.)

In the order of reference the court below required the referee to charge the appellant with the value of the rents, issues, and profits of this property, which he might or should have received as the occupant from November 10, 1871, to May 10, 1872, and judgment was rendered upon the findings for the sum of $450.00, for the value thereof. The appellant was responsible to the respondents as a trustee, and not as an occupant of the property. What he might or should have received in these different relations would affect to a great extent the amount which was found by the referee. The rule which the court prescribed was not authorized by law, and, as we cannot examine the testimony to determine the sum which should have been ascertained, we must strike $450.00 from the judgment.

From May 10, 1872, to February 5, 1876, the appellant deprived the respondents of the possession of their property by means of his fraudulent practices while he was acting as their trustee. (Roush vs. Fort, supra.) What the respondents lost by the undue advantage
288 taken by the appellant must be made good, and the appellant must account for his misconduct without regard to subsequent events of a mere accidental nature, which would have seriously affected the interests of the respondents. (Bigelow on Fraud, page 512. Kaye vs. Powel, 1 Ves, Jr., page 408. Fox vs. Mackreth, 2 Cox, page 320.) The appellant was therefore adjudged responsible as an occupant of the premises from May 10, 1872, to February 5, 1876.

The appellant during this time sold a building which was located partly on this property, and afterward removed, and the court rightfully found that the respondents were entitled to receive the value of the same, $50.00. The appellant insists that the court below cannot divert the rents of the premises from their application on the judgment which the respondents owed to him. But there is no judgment on which they can be paid on account of the refusal or negligence of the appellant to take the steps which are necessary to revive it. A party cannot be required to do an impossible act, and we know of no mode by which these rents can be applied on the original judgment of the appellant, that
289 appears in the record to have been fully satisfied. The judgment

of the court below is modified by striking therefrom the sum of $618.51, and in all other matters the judgment is affirmed with costs.

(Signed) DECIUS S. WADE,
Chief Justice.

(Signed) HIRAM KNOWLES,
Asso. Justice.

(Signed) HENRY N. BLAKE,
Asso. Justice.

(Endorsed:) 263. In supreme court, Montana Territory, George and Eliza Roush vs. Henry T. Fort et al. Opinion and decision of the court on appeal, delivered by Blake, associate justice. Filed and entered Jan'y 28, A. D. 1878. I. R. Alden, clerk.

Thereupon judgment in said cause on appeal was entered in the words and figures following, that is to say:

Judgment on appeal.

In the supreme court of Montana Territory, January term, A. D. 1878.

GEORGE ROUSH AND ELIZA ROUSH, respondents,
vs.
HENRY T. FORT, appellant.

290 Be it remembered that in the present term of January, in the year of our Lord one thousand eight hundred and seventy-eight, the above entitled cause was brought into the supreme court of the Territory of Montana, by virtue of an appeal from the judgment entered therein on the 30th day of June, A. D. 1877, in the district court of the 3rd judicial district of said Territory, in and for the county of Lewis and Clarke, agreeably to the statute of said Territory and the rules of said supreme court in such case made and provided. And whereas, on the 28th day of January, A. D. 1878, the said cause came on to be heard before the court, on the transcript of the record of said district court in said cause, and was argued by counsel.

In consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said district court entered in this cause as aforesaid be, and the same is hereby, modified, by striking therefrom the sum of six hundred and eighteen dollars and fifty-one cents ($618.51), and that in all other matters the said judgment is affirmed with costs. And it is further ordered by the court that the said respondents, George Roush and Eliza Roush, recover against the said defendant and
291 appellant, Henry T. Fort, dollars for their costs herein expended, and have execution therefor.

28th January, A. D. 1878.

To the rendition of said opinion and decision, and the entering of judgment on appeal in conformity therewith, the said defendant and appellant, Henry T. Fort, by his counsel, Messrs. Woolfolk and Porter, at the time duly excepted.

And afterwards, to wit, on the 30th day of January, A. D. 1878, the said appellant, Henry T. Fort, by his counsel, A. M. Woolfolk and H. M. Porter, esq'r's, filed herein their motion for a rehearing in said cause in this court, of which said motion for rehearing in words and figures the following is a copy, that is to say:

Motion for a rehearing.

In the supreme court of the Territory of Montana, January term, A. D. 1878.

GEORGE AND ELIZA ROUSH, RESPONDENTS,
vs.
HENRY T. FORT ET AL., APPELLANT.

Now comes Henry T. Fort, appellant herein, and moves the honorable court for a rehearing of the above cause, for the following reasons, to wit:

First. The supreme court assumed that appellant Fort
292 had a remedy under the statutes of Montana to revive the balance of the judgment in his favor, and therefore declined to grant the relief prayed for in his answer. But there is no statute provided for a case like the one at bar.

Codified Statutes, sec. 286, page 89 (same provision in new Code, sec. 336), only provides for reviving a judgment where "the purchaser of real property sold on execution, or his successor in interest, shall be evicted therefrom in consequence of irregularities concerning the sale." Or if such "purchaser of property at sheriff's sale, or his successor in interest, fail to recover possession in consequence of irregularity in the proceedings concerning the sale."

Second. It is respectfully submitted that the case of the appellant does not come within either of the provisions of this statute. He has neither been evicted from the possession nor has he failed to recover possession of the property purchased by him under the decree. On the contrary, he has been in possession of such property since the date of the sale to the commencement of this action, as shown by the complaint of plaintiffs. He is charged for such possession and occupancy
293 by the order of reference (record page 55). It was in consequence of such possession and occupancy that the judgment of the district court was rendered against him. It was for the same reason that such judgment has been affirmed in this court. While it is true, as claimed by appellant, that since the sale under his decree has been set aside, he acquired no legal title or possession to the property purchased, yet it has not been denied that he had the actual possession thereof prior to the sale, and has retained such possession since and up to the commencement of this action. Besides, if there was anything in this objection, it has been waived by the respondent himself, who asked in his complaint that such rents might be credited upon the balance of the judgment.

Third. It is plain that appellant has no remedy under the provisions of this statute or at law, as he has never been evicted to, failed to recover possession, and hence must go into equity for relief. All the authorities agree that equity will relieve when a party has a right but no remedy at law.

Fourth. As shown by the authorities heretofore cited, equity
294 would not require an independent and separate action for the purpose of obtaining this relief, but to avoid a multiplicity of suits will leave nothing for future litigation, but will do complete justice between the parties who are all before it.

Fifth. Independent of the well established doctrines of equity, this was a proper subject for cross-complaint under sections 5, 6, and 7 of Codified Statutes. It arose directly "out of the transaction set forth in

the complaint as the foundation of plaintiffs' claim." The judgment of the supreme court, setting aside the sheriff's sale, gave plaintiffs their right of action, and the same judgment furnishes the ground for the equity relief asked by defendant.

Sixth. The very judgment which set aside the sale under the decree in effect revived such decree. The respondent's attorney claimed in his brief that it did not require to be revived. When the sale was set aside, it left both parties as if it had not taken place. This court has recognized the correctness of this position by setting aside the claim for
295 $168.51, allowed against appellant by reason of his purchase at this sale. If setting aside the sale extinguished the indebtedness of $168.51 due from appellant to respondent, it must for the same reason have revived the indebtedness of $1,492.24, due from respondent to appellant. It would not have extinguished one indebtedness without reviving the other, because such extinguishment proceeded on the basis that setting aside the sale left the parties as they were before.

Seventh. Even if the judgment needed to be revived, it would only be for the purpose of enforcement against the property. But the indebtedness, the foundation of the judgments, existed the very instant the sale was set aside. Such indebtedness could properly be set off against any claim of respondents for rents and profits.

WOOLFOLK AND PORTER,
Att'ys for Appellant.

(Endorsed:) 263. George and Eliza Roush vs. Henry T. Fort et al. Motion of appellant for rehearing. Filed January 30, 1878. J. R. Alden, clerk.

And on the same day, to wit, the 30th day of January, A. D.
296 1878, the said motion of the appellant for a rehearing herein coming on to be heard before the court, it is ordered by the court that said motion be denied, to which ruling of the court overruling appellant's motion for a rehearing of said cause the said appellant by his attorneys at the time duly excepted.

And afterwards, to wit, on the 31st day of January, A. D. 1878, the said appellant, Henry T. Fort, by his attorney of record, A. M. Woolfolk, esq., filed herein and submitted for the consideration of the court his motion for special findings in said motion stated, which said motion is in the words and figures following, to wit:

Appellant Fort's motion for special findings.

In the supreme court of the Territory of Montana. January term thereof, A. D. 1878.

GEORGE AND ELIZA ROUSH, PLAINTIFFS, AND respondents,
vs.
HENRY T. FORT ET AL., DEFENDANTS AND appellants.

Now comes Henry T. Fort, appellant, and moves the honorable supreme court to make findings in the above cause, as required by law, for the purpose of perfecting an appeal herein to the Supreme
297 Court of the United States, and respectfully suggest the following findings for adoption

First. On the 16th day of March, 1871, the appellant, Henry T. Fort, obtained a decree foreclosing a mortgage upon certain real estate of respondents in the district court of Lewis and Clarke County.

Second. After obtaining such decree, he agreed with the plaintiffs and respondents that he would not sell thereunder until after the 1st day of October, 1871; and in consideration of such agreement the plaintiffs turned over to him the possession of the property embraced in the mortgage to collect the rents and apply the proceeds to the payment of his indebtedness under the decree.

Third. The defendant Fort caused the property to be sold under his decree on the 10th day of November, 1871, and purchased a portion of it himself, the remainder being purchased by Frederick Reece and J. W. Stoner.

298 Fourth. The plaintiffs and respondents afterwards instituted an action against the defendant Fort, together with Reece and Stoner, in equity, to set aside the sheriff's sale to them under the decree, and charged the defendant Fort with violation of his agreement, and with various acts of fraud in the sale of the property.

Fifth. The cause was referred to W. E. Cullen, master in chancery, who found that the sale under the decree had been fairly and honestly conducted, and that the property brought reasonably fair prices, but that the defendant Fort issued his order of sale under the decree for $3,342.68, when it should have been only issued for $3,022.22, after allowing credits for all rents collected and disallowing certain claims of Fort for commissions, &c. The master further found that, after deducting costs of sale, the defendant Fort owed the plaintiffs the sum of $107.76.

Sixth. The district court affirmed the sale of the property on the report of the master, to Fort, Reece, and Stoner; but afterwards the supreme court of the Territory, on appeal, set aside the sale of the property as to Fort, and confirmed it as to Reece & Stoner.

299 Seventh. The plaintiffs then filed an amended and supplemental complaint to charge defendant Fort, as trustee of the property purchased by him at sheriff's sale; and also asked that he be charged as for the occupancy of it.

Eighth. That up to the time of filing the amended and supplemental complaint, E. W. Toole, esq., had been the attorney of record of defendant Fort.

Ninth. That E. W. Toole, esq., had, however, ceased to be the attorney of said Fort at the time of filing the amended and supplemental complaint, and so stated to the attorneys for plaintiffs, and declined to receive a copy of such supplemental complaint for that reason. That plaintiffs' attorneys directed the clerk of the district court that a copy of such supplemental complaint be served upon said E. W. Toole, esq., but he told the clerk that he need not serve such copy for the reasons above given.

Tenth. That no copy of the amended and supplemental com-
300 plaint was served upon defendant Fort or any attorney for him.

Eleventh. That defendant Fort did not answer within the time prescribed, and upon motion for default against him, and also upon the motion of his attorneys, Messrs. Woolfolk and Porter, for leave to plead, the court only permitted him to answer to the merits, and refused to allow him to file motion to strike amended and supplemental complaint from the files.

Twelvth. The court struck out that portion of defendant Fort's answer asking for a revival of the balance of his judgment remaining unsatis-

fied since the sale thereunder had been set aside; also asking that it be set off against the claim of plaintiffs for rents and profits, and that defendant have other relief.

Thirteenth. The court also refused to permit the defendant to file an amendment to his answer in lieu of part stricken out, setting up the insolvency of plaintiffs as an additional fact, and asking that the balance of the judgment be revived and considered in the accounting.

301 Fourteenth. The court directed the master to charge Fort as for the occupancy of the premises purchased by him from November 10, 1871, to Feb'y 5th, 1876.

Fifteenth. The court directed the referee or master to ascertain what damage, if any, had been sustained by the plaintiffs, in consequence of defendant having sold the property for $3,342 $\frac{68}{100}$ instead of $3,022 $\frac{22}{100}$, and the master reported that there was no evidence offered of such damages.

Sixteenth. The referee found against the defendant in the sum of $3,335 $\frac{67}{100}$, which was confirmed by the district court to the extent of $1,836 $\frac{31}{100}$, and set aside as to the remainder.

Seventeenth. There was no proof before the referee or master that defendant Fort had been guilty of any neglect in reference to renting the property or keeping it rented.

Eighteenth. There was evidence before the referee that Fort treated and regarded the property as his own, and did the best he could with it.

302 Nineteenth. There was no evidence before the referee as to the actual rents received by Fort, except the evidence of himself—George Fox, his agent, and Carr, tenant; and this evidence showed the rents actually collected to have been less than $200.00.

Twentieth. Of the property purchased by Fort, lots 3 and 99 had a one-story house, frame building, on them, 12 feet wide x 40 feet long, and this burned down on January 9, 1874, during a general conflagration, that destroyed a large portion of the town of Helena. The rest of the property purchased by him were vacant lots except one, on which was a portion of a frame building that was torn down shortly after Fort's purchase, and was valued by the master at $50.00.

Twenty-first. The referee charged Fort as for the occupancy of the vacant lots, and also for the building on lots 99 and 3, during the entire time, without any reference to the sum actually received by Fort for the rent. He was charged by the referee $75 per month for this

303 property during a period when the evidence showed he was receiving $20.00 per month for it. He was also charged $60.00 per month for it during a period when he was receiving but $50 per month, and he was afterwards charged $50 per month for the year 1873, during a portion of which time the property was vacant; and the master also charged him $25.00 per month for the vacant lots (99 and 3) after the property had been destroyed by fire. Fort appealed to the supreme court of Montana Territory from the aforesaid judgment on the report of the master.

All of which is respectfully submitted.

WOODFOLK AND PORTER,
Att'ys for Appellant Fort.

(Endorsed:) 263. In supreme , Montana Territory, Jan'y term, A. D. 1878. Geo. Roush and Eliza Roush, plaintiffs and respondents, vs. Henry T. Fort et al., appellants. Motion of the appellant for special findings. Filed Jan'y 31, A. D. 1878. J. R. Alden, cl'k.

And afterwards, to wit, on the first day of February, A. D. 1878, the said cause coming on to be heard before the court on the appellant's said motion for special findings herein, on consideration the court ignored the findings suggested by the appellant for adoption, and
304 specified in his said motion and orders that said motion be denied.

But the court, on its own motion makes certain findings of fact, which are filed, and are in the words and figures following, to wit:

Findings of fact by the supreme court, M. T.

In the supreme court of the Territory of Montana, January term, A. D. 1878.

GEORGE AND ELIZA ROUSH, PLAINTIFFS AND respondents,
vs.
HENRY T. FORT ET AL., DEFENDANT' AND appellant'. } 263.

1st. That the sale by Fort was for an amount greater than the amount due him on his judgment, to wit, in the sum of $320 $\frac{46}{100}$, and that the sale for the amount in excess of the judgment was wrongful and fraudulent on the part of Fort.

2. That Fort went into possession of the mortgaged premises sold under said judgment by virtue of an agreement and held possession by virtue of such agreement for six months. After the expiration of the six months, and until he received the sheriff's deed, being for seven months, he had possession without any agreement. After he received the sheriff's deed, and until the sale was set aside, he held possession by virtue of such deed and sale.

305 3. That from May 10, 1872, to February 5, A. D. 1876, the appellant deprived the respondents of the possession of their property by means of said fraudulent sale.

4. That the reasonable value of the use and occupation of such property for that period was $1,270.00.

D. S. WADE,
Chief Justice.
HIRAM KNOWLES,
Asso. Justice.

Filed Feb'y 1, 1878.

J. R. ALDEN, *Clerk.*

(Endorsed:) 263. In supreme court, Montana Territory, Jan'y term, A. D. 1878. Geo. and Eliza Roush, plaintiffs and respondents, vs. Henry T. Fort et al., defendant' and appellant'. Special findings of fact. Filed Feb'y 1, A. D. 1878. J. R. Alden, clerk.

To the order of said court, overruling appellant Fort's said motion for special findings in said motion recited, and to the said findings of fact by the court on its own motion, of which the foregoing is a true and correct copy, the said appellant Fort, by his attorneys of record herein, then and there at the time duly excepted.

306 Thereupon the said appellant, Henry T. Fort, prayed an appeal from the decision and judgment of this court, rendered and entered in said cause on the 28th day of January, A. D. 1878, to the Supreme Court of the United States, which was granted by the court.

And on the second day of February, A. D. 1878, the said appellant Fort, by his attorneys, Messrs. Woolfolk and Porter, filed herein his appeal in writing, to remove said cause to the Supreme Court of the United States from this court, of which said appeal, in words and figures, the following is a copy, to wit:

Supreme Court of the United States.

GEORGE ROUSH AND ELIZA ROUSH, PLAINTIFFS and appellees,
vs.
HENRY T. FORT ET AL., DEFENDANT AND APpellant.

307 To the honorable the Supreme Court of the United States:

The appeal of Henry T. Fort, the above-named defendant and appellant, respectfully showeth: That upon the 15th day of March, A. D. 1876, the above-named complainants filed their amended and supplemental complaint against the above-named defendant in the district court of Lewis and Clarke County, Montana Territory, for the purpose of requiring and compelling him to account, as trustee, for the rents and profits of certain real estate, which had been purchased by defendant at sheriff's sale, in said Lewis and Clarke County, which said sale was made under a decree foreclosing a mortgage upon said real estate in favor of defendant and against the plaintiffs; that the said defendant filed his answer to said complaint, and the said cause was referred to one J. R. Alden, master in chancery, and that upon the report of said Alden, judgment was rendered against the said defendant by the said district court in the sum of eighteen hundred and thirty six and $\frac{31}{100}$ dollars, from which said judgment appeal was taken by the said defendant to the supreme court of Montana Territory; that on the 28th day of January, A. D. 1878, a final decree was made and pronounced in said
308 cause by the said supreme court of Montana Territory, wherein, in substance, it was adjudged and decreed that the defendant pay to the plaintiffs the sum of twelve hundred and seventeen and $\frac{80}{100}$ dollars and costs of suit, and it was further adjudged that defendant Fort should not revive in this proceeding the balance of the judgment in his favor against the plaintiffs, and set off the same against the aforesaid amount. Wherefore this appellant appeals from the whole of said decree of the said supreme court of the Territory of Montana, and respectfully prays that the decree of said supreme court, the original bill, the amended and supplemental bill, the answer, pleadings, depositions, evidence and proceedings in the said cause, may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew; and that the said decree of the supreme court and every part thereof may be reversed, and a decree made dismissing said libel with costs, or such other decree as to the said Supreme Court shall seem just.

WOOLFOLK AND PORTER,
Solicitors for Appellant.

309 DISTRICT OF MONTANA TERRITORY, *ss:*

GEO. ROUSH AND ELIZA ROUSH, PLAINTIFFS AND appellees,
vs.
HENRY T. FORT ET AL., DEFENDANT AND APpellant.

H. M. Porter, being duly sworn, saith that on the 2nd day of February, A. D. 1878, at Helena, in said Territory, he served on George Roush and Eliza Roush, the above named appellees, a copy of the appeal and a copy of the citation filed in this cause with the clerk of the supreme court in and for the Territory of Montana, by delivering said copy of the citation to each of said appellees personally, and by leaving said copy of the appeal for said appellees in the clerk's office of the supreme court aforesaid.

(Signed) H. M. PORTER.

Subscribed and sworn to before me this 2nd day of February, A. D. 1878.

(Signed) A. M. WOOLFOLK,
Notary Public.

(Endorsed:) 263. Supreme Court of the United States. George Roush and Eliza Roush, plaintiffs and appellees, vs. Henry T. Fort et al., defendant and appellant. Appeal. Filed February 2nd, A. D. 1878. I. R. Alden, clerk.

310 And afterwards, to wit, on the same day, to wit, on the second day of February, A. D. 1878, the said appellant, Henry T. Fort, filed herein his citation on appeal with affidavit of service ther'of annexed thereto, which said citation and affidauit of service is in the words and figures following, to wit:

Citation.

GEORGE ROUSH AND ELIZA ROUSH, APPELlees,
vs.
HENRY T. FORT, ET AL., APPELLANT.

By the honorable Decius S. Wade, chief justice of the supreme court in and for the district of Montana Territory:

To George Roush and Eliza Roush, appellees:

Whereas, Henry T. Fort has lately appealed to the Supreme Court of the United States, from a decree lately rendered in the supreme court of the Territory of Montana, made in favor of you, the said George Roush and Eliza Roush, and has filed the security required by law, you are therefore hereby cited to appear before the said Supreme Court at the city of Wasbington, on the second Monday in October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Helena, in the district of
311 Montana Territory, the second day of February, in the year of our Lord one thousand eight hundred and seventy eight.

(Signed) D. S. WADE,
Chief Justice of the Supreme Court of Montana Territory.

Affidavit of Service.

DISTRICT OF MONTANA TERRITORY,
County of Lewis and Clarke, ss:

H. M. Porter, being first duly sworn, says, that on the second day of February, A. D. 1878, at Helena in said Territory, he served on George Roush and Eliza Roush, the above named appellees, copies of the above citation by delivering said copies of the citation to each of said appellees personally.

(Signed) H. M. PORTER.

Subscribed and sworn to before me, this second day of February, A. D. 1878.

I. R. ALDEN,
Clerk.

(Endorsed:) 263. In supreme court Montana Terrritory. George Roush and Eliza Roush, appellees, vs. Henry T. Fort et al., appellant. Citation. Filed February second, A. D. 1878. (Signed) I. R. Alden, clerk.

And afterwards, to wit, on the same day, to wit, on the second day of February, A. D. 1878, the said defendant and appellant, Henry
312 T. Fort, by his attorneys of record, Messrs. Woolfolk and Porter, filed in said cause his bond on appeal to the Supreme Court of the United States, with the justification of the sureties thereon, and the approval thereof by Hon. D. S. Wade, chief justice of said Territory of Montana, and order granting a supersedeas herein, annexed thereto, of which said bond, with such annexations and sundry endorsements, in words and figures, the following is a correct copy, to wit:

Supreme Court of the United States.

GEORGE ROUSH AND ELIZA ROUSH, PLAINTIFFS,
vs.
HENRY T. FORT ET AL., DEFENDANTS.

Know all men by these presents, that we, George W. Fox and John C. Curtin, of the county of Lewis and Clarke, and Territory of Montana, are held and firmly bound unto George Roush and Eliza Roush, of said county and Territory, plaintiffs herein, in the sum of three thousand dollars, to be paid to the said George Roush and Eliza Roush, their executors or administrators. To which payment, well and truly to be made, we bind ourselves and each of us jointly and severally
313 and our and each of our heirs, executors, and administrators jointly by these presents. Sealed with our seals, dated this second day of February, A. D. 1878.

Whereas, the above named Henry T. Fort has appealed to the Supreme Court of the United States to reverse the decree rendered in the above entitled action by the supreme court of Montana Territory,

Now therefore the condition of this obligation is such, that if the above named Henry T. Fort shall prosecute his said appeal to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

GEO. W. FOX. [SEAL.]
JOHN C. CURTIN. [SEAL.]

TERRITORY OF MONTANA,
County of Lewis and Clarke, ss:

George W. Fox and John C. Curtin being first duly sworn, depose and say that they are the sureties to the foregoing bond; that they are residents and freeholders of the county of Lewis and Clarke, and Territory aforesaid, and are each worth the amount named in the
314 foregoing undertaking as the penalty thereof, over and above all their debts and liabilities exclusive of property exempt by law from execution.

GEO. W. FOX.
JOHN C. CURTIN.

Subscribed and sworn to before me this second day of February, A. D. 1878.

Witness my hand and seal.
[NOTARIAL SEAL.]

I. B. PORTER,
Notary Public, Montana Territory.

Notary fee, $1.00.

Bond approved and supersedeas ordered.

D. S. WADE, *Judge.*

Feb'y 2, 1878.

(Endorsed:) 263. Supreme Court of the United States. Geo. and Eliza Roush vs. Henry T. Fort et al. Bond on appeal. Filed Feb'y 2, A. D. 1878. I. R. Aldin, clerk.

315 In supreme court, Montana Territory.

GEORGE AND ELIZA ROUSH
vs.
HENRY T. FORT.

I, I. R. Alden, clerk of the supreme court of Montana Territory, do hereby certify that the foregoing three hundred and fourteen pages, numbered from one to 314 inclusive (except such as are marked "omitted" and signed by the clerk in red ink), contain a full, true, and correct transcript of certain pleadings, records, and proceedings filed, made, and had in the above entitled cause, as the same appear on file and of record in my office.

In witness whereof, I have hereunto set my hand & affixed my official seal. this 17th day of June, A. D. 1878.

[SEAL.]

I. R. ALDEN,
Clerk.

(Indorsement on cover:) No. 290. Henry T. Fort, appellant, vs. George Roush and Eliza Roush. Montana Ter't'y supreme court. Filed 18th October, 1878.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1880.

No. 290.

HENRY T. FORT, APPELLANT,

vs.

GEORGE ROUSH AND ELIZA ROUSH.

Appeal from the Supreme Court of the Territory of Montana.

BRIEF FOR APPELLANT.

JOHN F. PHILLIPS
AND
BARTLEY & SOUTHARD,
Attorneys for Appellant.

WASHINGTON:
1881.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1880.

No. 290.

HENRY T. FORT, APPELLANT,

vs.

GEORGE ROUSH AND ELIZA ROUSH.

Appeal from the Supreme Court of the Territory of Montana.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

On February 21, 1871, Henry T. Fort commenced an action in the Third Judicial District of Montana Territory, against George Roush and Eliza Roush, his wife, to foreclose a mortgage on real property, executed by them to him.

On March 16th, 1871, Fort obtained a decree for the sum of $2,895.90 and costs.

Fort also owned a certain other judgment against Roush and wife, which had been recovered in case of Hartwell against them in the sum of $238.

On July 8, 1871, Fort agreed in writing with Roush and wife not to sell under his decree before October 1, 1871, in consideration of the receipt of certain rents, &c. (See Master's Report, Rec., p. 29.)

On the 10th day of November, 1871, Fort caused the premises to be sold at sheriff's sale to satisfy the said decree and judgment.

At said sale Fort, Frederick Reece and Isaac W. Stoner became purchasers—each of a separate portion.

No steps were taken by Roush and wife to defeat or set aside said sale, or to amend the execution until on the 23d day of

April, 1872, when they filed their bill in equity against Fort, Reece and Stoner (Record, p. 91); and on November 6th) 18 72, they filed an amendment to said bill. (Record, p. 93.,

The bill and amendment alleged, among other things not pertinent to the issues herein, that the order of sale was issued for a greater amount than was due to Fort at that time; and that it was in violation of a certain written agreement, theretofore entered into between Fort and Roush and wife; and prayed that the said sale might be set aside and the possession of the premises be restored to them, and for general relief. No accounting from Fort was claimed in said complaint and no relief sought save that of setting aside the sale made and the restoration of the possession of the premises.

The defendants, Fort, Reece and Stoner, answered the bill of complaint, and all facts were found in their favor at the hearing of the cause, save that the order of sale was issued for some $320.46 more than was then due to Fort on his said decree and judgment, exclusive of costs which amounted to $236.15. In all other respects the sale was found to be fair and legal. Thereupon the court dismissed complainants' bill and confirmed the sale as made. (Record, p. 10.)

From this decree Roush and wife appealed to the Supreme Court of the Territory.

The cause came on to be heard in the Supreme Court, at its January term, A. D. 1876, and the decree of the court below was affirmed as to the sales made to Reece and Stoner, but reversed as to the sale made to the defendant Fort; the decision being placed upon the sole ground that the sale was made for an amount in excess of what was then due to Fort on his said judgment and decree. (Rec., p. 95.)

The Supreme Court thereupon remitted the cause to the court below for execution for costs and for other proper proceedings. (Rec., pp. 97, 98.)

The cause having thus come back to the district court, Roush and wife filed their amended and supplemental bill, seeking to charge Fort as a trustee for the occupancy, rents, issues and profits of the premises so sold, and for all damages resulting to the same while in his possession. (Record, p. 1.)

This amended and supplemental bill was filed March 15, 1876, and a copy thereof was attempted to be served upon Mr. Tool, who had acted as attorney for Fort in the cause, but who, it was claimed, had then retired from the case and had so notified the attorneys of Roush and wife. On the validity of this service, an order was entered by the court requiring Fort to plead on or before March 18, 1876.

The pendency of this amended and supplemental bill not having previously come to the attention of the rightful attorneys of Fort, they, on the 7th of December, 1876, asked leave to plead thereto, on the ground that legal service had not been made in the case, and for the purpose of moving to strike the said amended and supplemental bill from the files, for the reason that it changed the entire nature and character of the action, and involved a change of parties. The court refused this application and permitted Fort to answer to the merits on conditions of payment of costs. (Record, p. 6.)

The answer of Fort was filed January 21, 1877, under the conditions above stated. (Record, p. 7.)

On May 22, 1877, Roush and wife filed their replication to the answer. (Record, p. 15.)

And on the same day (May 22, 1877,) they also filed a motion to strike out that portion of Fort's answer, relative to his claim for the unsatisfied balance of his decree after the sale had been set aside as aforesaid. (Record, pp. 15, 16.)

And on January 13, 1877, on leave of the court, they filed their amended motion in this behalf, which was sustained by the court and that portion of Fort's answer was stricken out. (Record, p. 17.)

Afterwards Fort moved on two different occasions to amend his answer in respect of reviving his said decree for the unsatisfied balance thereof, and alleging the insolvency of Roush and wife, which motions were denied. (Record, pp. 17, 19, 22, 30.)

Upon the issues thus joined, the court, at the hearing, ordered the same to be sent to a referee with special instructions as to the nature and extent of his inquiry, and directed him to take the testimony in writing and report the same with his findings to the court. (Record, pp. 20, 21.)

The referee made report (Record, p. 31), and Fort excepted thereto. (Record, p. 78.)

These exceptions were overruled, and the report confirmed to the extent of $1,836.31; and final decree entered accordingly, and motion for new trial was overruled. (Record, p. 83.)

From this decree Fort appealed to the Supreme Court of the Territory. (Record, p. 84.)

The cause came on to be heard in the Supreme Court at its January Term, A. D. 1878, and the court modified the decree of the court below to the extent of striking therefrom the sum of $618.51: and in all other respects affirmed the same with costs. Exceptions to the decision were taken by Fort. (Rec., pp. 105, 106, 107, 108.)

From this final decree of the Supreme Court of the Territory Fort appealed to the Supreme Court of the United States.

Exceptions were duly taken to all the adverse rulings and decisions of the court below, as will appear from the record, and to the findings and report of the referee.

With this very general statement of the history of the case we will proceed to notice the errors complained of by the appellant.

Assignment of Errors.

Appellant claims there is error in the proceedings of the court below in the following particulars:

I.

In denying leave to Fort to plead generally to the amended and supplemental bill and requiring him to answer to the merits on penalty of payment of costs, without a copy of the amended and supplemental bill having been served upon him as required by law.

II.

In striking out that portion of Fort's answer as filed, which set up his claim for the unpaid balance of his decree after the sale was set aside; and in denying him leave thereafter to amend his answer in such behalf with the additional averment of the insolvency of Roush and wife.

III.

In the directions to, findings and report of, the referee, and the rulings of the court thereon, in the following particulars to wit:

(*a*) There was error in directions to referee in this: that the rule prescribed does not limit the inquiry into the rents, &c., which *should* or *might* be received to the exercise of due care and diligence, but permits a larger measure.

The following is the direction (Record, p. 20):

"*Second.* For the value of the rents, issues, and profits of the property purchased by Fort at sheriff's sale, on the 10th day of November, 1871, which he received, or should or might have received on account of the occupancy of the said premises, said Fort to be charged as for the occupancy thereof from the 10th day of November, 1871, to the 5th day of February, 1876."

(*b*) There was error in the findings and report of the referee upon the value of the use and occupation of lots 3 and 99 in block 20 in this: that he did not find the amount actually received, or should have been received with the exercise of proper prudence, care, and diligence on the part of Fort, and that there is no evidence to sustain the findings and report.

The following are the items in question (Record, p. 52):

"*First.* That the rental value per month of lots 3 and 99 in block 20, together with improvements situated upon the same, from the 10th day of November, 1871, to the 1st day of January, 1873, was $75.00."

"*Second.* That the rental value of the said premises per month, from the 1st day of January, 1873, to the 9th day of January, 1874, was $50.00."

The following are the exceptions thereto. (Record, p. 78.)

"*First.* For that the value of the use and occupation of lots 3 and 99, in block 20, in the town of Helena, from the 10th November, 1871, to November 10, 1872, was found by the referee to be seventy-five dollars per month, amounting to $900, while the evidence shows that said lots for said time were not worth more than twenty dollars per month."

"*Second.* For that said referee found the value of the use and occupation of said lots Nos. 3 and 99, from November 10, 1872, to November 10, 1873, to be sixty dollars per month,

amounting to $720, while the evidence shows the value of the use and occupation of said lots during said time to be not more than twenty dollars per month for a part of said time, and that during a part of said time the said premises could not be rented for anything."

"*Third.* For that said referee found the value of the use and occupation of said lots 3 and 99 from the 10th day of November, 1873, till the 9th day of January, 1874, to be fifty dollars per month, while the evidence shows that said premises during said time could not be rented for any price, and had no rental value during said time."

"*Fourth.* For that said referee found the value of the use and occupation of said lots from January 9th, 1874, till February 5th, 1876, to be twenty-five dollars per month, while the evidence shows that during said time the use and occupation of said lots was no of value whatever."

"*Seventh.* For that the referee did not fix the amount of rents received by defendant, Fort, for the property mentioned in his report as required by the order of reference."

"*Eighth.* For that the referee did not find what amount of rents defendant could have or might have received for said property."

"*Twelfth.* The findings of the referee are against the evidence and not sustained by the evidence reported by the referee, and are not responsive to the issues submitted by the court to the referee."

The district court overruled these exceptions, to which exception was taken (Record, pp. 81, 83); and the Supreme Court of the Territory sustained the decision in so far as the same related to the occupancy of the premises after May 10, 1872, and held as follows: (Record, p. 103.)

"From May 10, 1872, to February 5, 1876, the appellant deprived the respondents of the possession of the property by means of his fraudulent practices while he was acting as their trustee. What the respondents lost by the undue advantage taken by the appellant must be made good, and the appellant must account for his misconduct without regard to subsequent events of a mere accidental nature, which would have seriously affected the interest of the respondents. The appellant was therefore adjudged responsible as on account of the premeises from May 10, 1872, to February 5, 1876."

And so the Supreme Court, after deducting $450 from the

decree below for the item of rents from November 10, 1871, to May 10, 1872, and $168.51 item found due from report of former referee, rendered a decree for the balance of said rents and damages, as the same was decreed by the district court, amounting to $1,217.80, rejecting entirely the claim of Fort for $1,492.24, the unsatisfied balance on his decree of foreclosure. Exceptions to this ruling and decision were duly taken. (Record, p. 104.)

IV.

There is error in other respects apparent on the face of the record.

ARGUMENT.

I.

Before Fort could be required to plead or any proceedings could be taken against him, on the amended and supplemental bill, he was entitled to have a copy thereof served upon him in the manner prescribed by the statute, which is in the following language: (Section 53, Codified Statutes 1871, 1872.)

"SEC. 53. If the complaint be amended, a copy of the amendments shall be filed, or the court may, in its discretion, require the complaint as amended to be filed, and a copy of the amendments shall be served upon every defendant to be affected thereby, or upon his attorney, if he has appeared by attorney. The defendant shall answer in such time as may be ordered by the court, and judgment by default may be entered upon failure to answer, as in other cases."

It is admitted that no copy was served on defendant personally, and none was served upon the attorneys who were then authorized to appear for him, but an attempt was made to serve the same upon a Mr. Tool, who had previously been attorney in the case, but who, at that time had retired from it and then notified the attorneys of complainants of the fact, and also the clerk of the court, who was directed to make service upon him. (Record, p. 6.)

This was sufficient notice to complainant, that he was not the attorney of defendant, notwithstanding his name appeared

as attorney of record in the case and had not been formally withdrawn.

Fort was thus denied the right of contesting the question of a change in the character of the action, or other preliminary question which was his rightful privilege, and which it would be difficult to assert, did not result injuriously to his interests.

His interests were affected to the extent, at least, of the costs adjudged against him; otherwise a denial of any defense.

II.

The court below manifestly erred in disallowing Fort the balance due on his judgment, after deducting the $1,800 realized on the execution sale to Reece and Stoner. After setting aside the sale of the lots purchased by Fort, he had, in fact, received nothing for this balance. Is it just or conscionable that Roush should not only get his property back, but judgment for most exorbitant rates of rent, never, in fact, received by Fort, and at the same time leave unpaid $1,217.80, with interest and costs, confessedly owing by him to Fort? Such a proposition is so shocking to good conscience, as to beget impatience at argument.

The respondents are claiming for use and occupation of the premises on the ground that the sale was voidable, and yet hold that their debt is satisfied because of that sale. Technically the sale and return on the execution were a satisfaction in law of the judgment; but the setting aside of that sale, carried with it all the incidents of satisfaction, and if the plaintiff in execution had acquired possession, a court of equity would not have let the execution defendant into possession until he paid the debt.

Jones *vs.* Mack, 53 Mo., 147.
Valle's Heirs *vs.* Fleming's Heirs, 29 Mo., 152.
Hudgins *vs.* Hudgins, 6 Gratton, 320.
Howard *vs.* North, 5 Texas, 315.

(*t*) The respondents in their bill recognized and admitted the justice and right of this defence, (see page 4 of record,) wherein they plead and ask that the amount of rentals, &c., claimed by them, "should be set off against any balance which may be due upon the said decree."

(*b*) The court below, however, disallowed this defence on the ground that the appellant had a remedy at law, by virtue of section 286, page 89, of Codified Statutes Montana, which is as follows:

"SEC. 286. If the purchaser of real property, sold on execution, or his successor in interest, be evicted therefrom in consequence of irregularities in the proceedings concerning the sale, or of the reversal or discharge of the judgment, he may recover the price paid, with interest, from the judgment creditor. If the purchaser of property at sheriff's sale, or his successor in interest, fail to recover possession in consequence of irregularity in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, the court having jurisdiction thereof, shall, on petition of such party in interest or his attorney, revive the original judgment for the amount paid by such purchaser at the sale, with interest thereon from the time of payment, at the same rate that the original judgment bore; and when so revived, the said judgment shall have the same effect as an original judgment of the said court of that date, and bearing interest as aforesaid; and any other or after acquired property, rents, issues or profits of the said debtor, shall be liable to levy and sale under execution in satisfaction of such debt. *Provided*, That no property of such debtor sold *bona fide* before the filing of such petition shall be subject to lien of said judgment; *And provided, further*, That notice of the filing of such petition shall be made by filing a notice thereof in the recorder's office of the county where such property may be situated, and that said judgment shall be revived in the name of the original plaintiff or plaintiffs, for the use of said petitioner, the party in interest."

To which we answer that said section contains two distinct substantive provisions, the first where the purchaser has been *evicted* "in consequence of irregularities in the proceedings *concerning the sale*, or of the reversal or discharge of the judgment." What is the remedy given? Simply and only that he "may recover the price paid, &c. from the judgment creditor."

How recover it? In the absence of any express statutory provision by suit, as for the enforcement of any other given right. The latter provision of said section conferring a right of summary proceeding by petition and notice, applies alone to the case specified in the second subdivision of said section. So that in order to make the first part of the section applicable

to the case at bar, it must be held that the mere reversal of the case by the Supreme Court of the Territory was a technical eviction. If so, this section conferred upon Fort the right to recover from Roush *et al.*, the price paid, &c.

And when Roush sued him for the rents and damages growing out of the occupancy of this property, he had the unquestioned right to set up this claim as a counter claim or by way of recoupment. See sections 56 aud 57, Codified Statutes, as follows:

"SEC. 56. The answer of the defendant shall contain a specific denial to each allegation in the complaint intended to be controverted by the defendant, and may contain a statement of any matter in avoidance or a counter-claim constituting a defence, or the subject-matter of cross complaint which may entitle the defendant to relief against the plaintiff alone, or against a defendant, or co-defendants," &c.

"SEC. 57. The counter-claim mentioned in the last section shall be one existing in favor of the defendant or plaintiff, and against a plaintiff or defendant, between whom a several judgment might be had in the action, and arising out of one of the following causes of action. First. A cause of action arising out of the transaction set forth in the complaint or answer, as the foundation of the plaintiff's claim or defendant's defence, as connected with the subject of the action. Second. In an action arising upon contract, any other cause of action also upon contract, and existing at the commencement of the action."

This provision of the Montana Code is copied from the New York Code, where such a defense is universally admitted.

Batterman *vs.* Pierce, 3 Hill, 171.
Willis *vs.* Chipp, 9 How. Pr. R., 568.
1st. Vansanfordt's Pleadings, 562, 568, 574.

The second subdivision of said section 286 applies to the case where "the purchaser of property at sheriff's sale fails to recover possession in consequence of irregularity in the proceedings concerning the sale, or because the property was not subject to execution and sale."

To give the summary remedy conferred by this clause, two things must concur: *First*, the purchaser must have failed to obtain possession; and, *second*, this failure must result from

"irregularity in the proceedings concerning the sale, or because the property was not subject to execution," &c.

Now, we submit that neither of these prerequisites existed; for the purchaser did obtain possession. The whole complaint is that he obtained and held possession, and the suit is for use and occupation. There was no "irregularity in the proceedings concerning the sale." The property was subject to execution and sale.

Where a party invokes such a statute in bar of the equitable jurisdiction of the court, he should be held at least to its letter.

III.

Admitting that section 286 afforded a remedy, it is not exclusive. The settled rule is that where a statute merely gives a new remedy, without negativing any other, it does not take away the common law or other remedy.

Stafford *vs.* Ingersol, 3 Hill, 39.
Renwick *vs.* Morris, 7 Hill, 576-7.
State *vs.* Bittenger, 55 Mo., 599.
1 Story's Equity, sec. 64 (*i*).
Spitts *vs.* Wells *et al.*, 18 Mo., 468.
Dobyns *vs.* McGovern *et al.*, 15 Mo., 662-668.
King *vs.* Baldwin, 17 John R., 388.
Bank of Utica *vs.* Mersereau *et al.*, 3 Barb. Ch., 530, 532. 586-7-8.

IV.

The respondents invoked the equity jurisdiction of the court to vacate the sale, and to recover from appellant the rents, &c. They must do equity. They must pay the debt

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to the case at bar, it must be held that the mere reversal of the case by the Supreme Court of the Territory was a technical eviction. If so, this section conferred upon Fort the right to recover from Roush *et al.*, the price paid. &c.

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IV.

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In Dufaur *vs.* Campane, 11 Martin (La.), 615, the court say: "Nothing could be more unjust than to permit a debtor to recover back his property because the sale was irregular, and yet allow him to profit by that irregular sale to discharge his debts."

1 Story's Equity, sec. 64 (*e*).
Kemp *vs.* Pryor, 7 Vesey, 249.
Bank of Utica *vs.* Mersereau, 3 Barb. Ch., 586–7–8.

McLaudidy vs. Ware 20 Wall. 14

(*a*) Unless the respondents pay the debt they honestly owe, they have no right to stand in a court of equity asking that appellant be deprived of an advantage acquired at law.

Reeves *vs.* Cooper, 1 Beasly (N. J. Eq.), 225.
McDonald *vs.* Neilson, 2 Cow., 139–140.
Jones *vs.* Neury *et al.*, 3 Lit. (Ky.), 436–7.

V.

A court of equity will not turn a party out of court to pursue his remedy at law where complete justice can be done by the court of equity, especially where he has been brought into the equity court.

Paris *vs.* Haley, 61 Mo., 454, 462.
Mosser *vs.* P. Mining Co., 11 C. E. Green. (N. J. Eq.), 200.
Walden *vs.* Bodley, 14 Pet., 164, 165.
King *vs.* Baldwin, 17 John. R., 384.
2 Story's Equity, secs. 1435, 1438.

(*a*) The first answer in this case presented the facts constituting this particular defense, and concluded with a general prayer for "such other and further relief as to the honorable court may seem just and proper." (P. 11, Record.) So in every subsequent effort of Fort to have the court consider this just claim against the complainants the facts were fully and clearly stated. (Record, pp. 17, 23.) From this, no matter in what form, whether single or in the alternative, the relief was asked, it was competent for the court to grant relief in such a case according to the facts stated.

Walden *vs.* Bodley, 14 Pet., 164.

VI.

We most respectfully but earnestly submit that the action and decree of the court below is most harsh and unwarranted, and ought to be revised and corrected. Fort, as a non-resident, was dealt with as an alien enemy, subject only to the laws of confiscation.

The head and front of his offending consist wholly in the fact that a judgment held by him for about $3,000 against the re-

spondents was not endorsed before execution issued with a small credit claimed by the debtors. There is no evidence whatever that this omission was *mala fides* or corrupt. The deposition of Fort (pp. 63–4–5 of Record) shows that he applied the rents as he conceived he had a right to do; that he advised respondents fully of his action; that he did account to them after the sale for everything. Not one dollar was applied to any object other than *bona fide* admitted debts owing to him by respondents.

There is not a syllable in the evidence that if the execution had issued for the exact sum due, the property would not have been sold, or that it could have been sold in such parcels as to have reserved any portion sold for the alleged excess of the execution. On the contrary, the referee reports that complainants offerred no evidence of any such damage. (Pages 31 and 33 of record.) The referee found, too, that the respondents misstated the terms of the agreement in their bill of complaint, that appellant had a right to issue the execution when he did. The respondants stood by at sale and, without offering to set aside by motion the sale and quash the execution, they flew to a court of equity to have sale vacated without offering to pay a dollar on the judgment, evidently intending to hold appellant to the hard legal conclusion of the return of satisfaction on the execution, while they recovered back the property with real and speculative rents.

And yet under such a state of case, the court treated appellant as a fraudulent trespasser on this property, without color of right, and held him not only liable for rents actually received and which he might have received in the exercise of ordinary diligence, but for the most speculative extraordinary valuations with *ten per cent. added.*

So that while he in fact received $815 in rents to the day of sale and accounted for the same, except $168.51, and whilst his agents testified to renting for and collecting all that was reasonably attainable thereafter, the district court gave judgment against him for $1,836.31, charging him *ten per cent.* damages on this sum—the sum actually realized being much less. And the Supreme Court affirmed this judgment to the

extent of $1,217.80, exclusive of consideration of the $815 item. And this, too, when the complaint itselfonly charged "that the amount of rents and profits received by him after the sale, upon the property purchased by him * * * was $600 to the — day of May, 1872," and the value of the use and occupation of the property which he did not rent from the time of sale to the filing of complaint is $500; (see p. 4 of record,) since which date the property has not been in appellant's possession. A party cannot recover judgment for a greater sum than that claimed in his petition.

VII.

Appellant was proceeded against as a trustee, holding the property under the circumstances in trust for respondents. In such case he was "not chargeable with imaginary values, or with more than he had received, unless there is evidence of gross negligence amounting to willful default."

Willard's Equity Juris., 614, 615.
Pybus *vs.* Smith, 1. Fes. Jr., 189.
Hamburg Man. Co. *vs.* Edsall. 1 Beas. N. J. Eq., 400-1.
Freeman *vs.* Scofield, 1 C. E. Green, 28.

The appellant was in possession under an agreement with respondents. It is neither charged nor proven that he was guilty of neglect in renting or collecting, and if he had continued under the agreement complainant could not have recovered more than the $815, and no damages resulted from its alleged breach.

VII.

The court below places much stress on the authority of the case of King *vs.* Platt, 37 N. Y., 155. But the facts are not parallel. There the request of the defendant was explicit to sell, first, a given lot, and six persons, experts, made affidavit that it would have been advantageous to defendant to so sell the property. No such proof is in the case at bar. Again, the sale in that case was made on an election day, a day of doubtful propriety, and against the defendant's protest. Not so here.

There "the plaintiffs manifested a desire before sale to purchase the whole property, and resorted to the means necessary to accomplish their object," and actually told one party in effect not to bid and prevented competition. Not so here. Fort, in his uncontradicted deposition, says: "I was anxious for the property to bring my debt. I wanted my money, not the property, and run it up as high as possible;" that he conferred with defendants before sale and they said he would have to sell as they could not raise the money. See p. 64 of record.

But what is most strikingly different in the two cases is this: There, the defendant came in by motion to have the sale set aside and the property *resold*, and the court ordered a resale and say: "A resale will probably result in *satisfying the judgment* and all the outlays of the plaintiffs, and *that is all they can reasonably ask*."

Here the respondents resort to equity to avoid the sale, neither asking for a resale nor offering to pay the judgment, but demanding pay for use and occupation with ten per cent. added, and recovering judgment for more than the property is worth and more than the amount bid on it to satisfy the judgment. If this be equity, wrong is right.

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